UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: RFC and RESCAP Liquidating Trust Litigation

File No. 13-cv-3451 (SRN/HB)

ResCap Liquidating Trust,

Plaintiff,

v.

Primary Residential Mortgage, Inc.

Defendant.

File No. 16-cv-4070 (SRN/HB)

St. Paul, Minnesota

Courtroom 7B

March 13, 2020

9:21 a.m.

BEFORE:

The Hon. **SUSAN RICHARD NELSON,**

United States District Judge

BENCH TRIAL - VOLUME XIII

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I N D E X

P R O C E E D I N G S

IN OPEN COURT

THE COURT: Good morning, everyone. Good morning, Dr. McCrary.

THE WITNESS: Good morning, Your Honor.

THE COURT: Do you have a lawyer there to assist you with the documents?

THE WITNESS: I have someone to assist me with the documents. I believe she has not yet passed the bar, but she's here.

THE COURT: Whatever. There's somebody there to help you with the documents. I don't think she has to have passed the bar.

THE WITNESS: I don't think so either.

THE COURT: Very good. Mr. Nesser, do you wish to proceed?

MR. NESSER: I'm pleased to see we have a better view today.

THE WITNESS: There were different IT people this morning.

(Justin McCrary)

CONTINUED CROSS-EXAMINATION

BY MR. NESSER:

Q. Dr. McCrary, welcome back. Did you consult with counsel

last night?
A. I confirmed that I was supposed to be here. There was some confusion about whether the courthouse was going to be closed and I wanted to make sure that I had the correct understanding of that. Other than that, no.
Q. And, Dr. McCrary, I wanted to talk about margins of error. One of your pillars of statistics relates to the accurate calculation of the margin of error, yes?
A. Sufficient precision, yes, that's correct.
Q. And for the trust settlements, the margin of error that Dr. Snow calculated is arguably more or less correct?
A. I'm sorry. If I heard you right you said, "is arguably more or less." I'm not sure I understand.
Q. For the trust settlements the margin of error that Dr. Snow calculated is arguably more or less correct, yes?
A. Oh. You said, "more or less correct"?
Q. Yes.
A. I think that there are reasons to question the margin of error calculation, but I don't believe that they come in at this matter.
Q. So you have some criticisms of it, but it's probably in the right ballpark, yes?
A. That might be a good way to say that, yes.
Q. And you've testified that Dr. Snow's margins of error are wide, yeah?

A. That's correct.
Q. And to begin with, you're not opining that Dr. Snow's margins of error are too wide, right?
A. I'm not sure I understand the distinction you're drawing between wide and too wide.
Q. Dr. McCrary, could you turn, please, to PTX-266.
A. Yes.
Q. And that's your deposition in PRMI, yes?
A. Yes.
Q. And could you turn, please, to page 108, PTX -- I'm sorry. Yeah, transcript page 108.
A. Yes, I'm there.
Q. And at lines 4 through 11 I asked you the question:
"You have an opinion in this case that Dr. Snow's margins of errors are too wide?
"Answer: I would have said that I'm not sure as to the modifier 'too,' but it's certainly my opinion that Dr. Snow's margins of error are wide."
And, Dr. McCrary, there's no bright-line rule for a margin of error, right?
A. That's correct, there's not a bright-line rule.
Q. And the factors that someone would consider in making that nonbright-line determination in this case or in any case is context specific?
A. I think that's correct as well.

Q. And, in fact, the margin of error that gets used in a given context is going to depend upon a broad set of considerations that you, Dr. McCrary, are not in a position to enumerate because every context is different, yes?
A. I think if one tried to enumerate it, it's probably right that you might have in a specific context something else that would occur to you and so I do think it's not necessarily possible to enumerate all of the contextual factors.
Q. But one of the factors relevant to an assessment of the relevant margin of error could involve the question of whether one is in a civil versus a criminal context, right?
A. I suppose it's right that in a criminal context in general the legal process, it's my understanding, requires more certainty than it does in a civil, yes.
Q. And as to what the trier of fact in a civil case or a criminal case might determine to be a sufficiently narrow margin of error, you're not aware of there being a bright-line rule as to that issue either, right?
A. That's correct, I'm not aware of a bright-line rule generally or in the specific context you're asking me about.
Q. And you're also not sure it's appropriate for you, Dr. McCrary, to weigh in on what factors a trier of fact ought to take into account in assessing whether the margin of error is appropriately wide, yes?

A. Well, my role as an expert witness is to help the trier of fact understand matters of statistics. It's not to tell anybody how to do their job. And I take the decision as to how to account for margin of error as contextual and outside of the domain of statistics.

Q. So you --

A. Statistics would be about instead trying to characterize what would be the margins of error and from a decision theoretic perspective to discuss the extent to which that might adjust, for example, an estimate, as I've testified to. But other than that, no.

Q. And so when you say that Dr. Snow's margins of errors are wide, what you mean is that you have a strong suspicion that if you were in a seminar room, the width of those margins of error is something that would come up, right?

A. I think actually your question has two parts to it where my answers are different. So it is right that if there were a seminar context where this kind of an estimate came up and this kind of margin of error, and here I am making reference to the trust settlement damages estimate because I take that to be what you're asking me about still, it is right that that is my view that would certainly be a question.

There was another part to your question, however, which asked whether or not that was the basis for my view that it was a wide margin of error and the answer to that

question would be no.
Q. And, Dr. McCrary, you're not sure what number the consensus in that seminar room would have been if the question were asked what is too wide, right?
A. Again, I don't think that there's a bright-line rule. And for the same reason that there's not a bright-line rule, I would say that consensus is a concept that's inapropos. What would happen instead in a seminar context is people would ask, well, what is this estimate going to get used for. That's the decision theoretic aspect of statistics and the economic aspect of econometrics.
Q. Dr. McCrary, you wrote that it would be reasonable and conservative to consider using a lower bound of the confidence interval as the measure of damages, right?
A. I'm not looking at the page that you're quoting from, but that sounds as though that's consistent with my opinion and I take it that you're quoting from a report of mine.
Q. And, Dr. McCrary, whether or not that's what it said, you would agree, sitting here today, that it would be reasonable and conservative to consider using the lower bound, right?
A. Yes, I think that that's correct.
Q. And you have never opined in any report and in any testimony that Dr. Snow actually should have used the lower bound, right?

A. I'm not sure that that's correct. It is my view that it's certainly correct that he should have considered it, and I think it's also correct that in the context of a money demand that that's an appropriate approach. I'm familiar with that approach from other contexts and to me that aligns the incentives.

If you're going to design a sampling and damages methodology that's associated with great imprecision, it seems as though, since the consequence of that imprecision falls upon the party who has to pay the money damages, it aligns incentives if the designer of that bears the consequence of that imprecision.

Q. And so, Dr. McCrary, are you testifying here today that in your view it would have been reasonable and conservative -- I'm sorry.

Are you testifying here today that in your view you believe Dr. Snow should actually have used the lower bound of the confidence interval as the measure of damages?

A. I suppose my view is really somewhere in between those two. I wasn't asked to put forward an affirmative damages methodology myself. It's certainly my view that in light of the imprecision associated with Dr. Snow's methodology, that he ought to have considered that. As to whether or not he should have, I think it's right that that's closer to asking me an affirmative question and I wasn't asked that.

Q. Okay. And you've not offered that opinion?
A. What I've offered instead is that I don't think that's a bad idea and, in fact, it's certainly one that ought to have been considered.
Q. Okay. And you cited the CMS Manual in your testimony yesterday, correct?
A. Yes, that's correct.
Q. And you talked about -- actually, I don't know that you cited the manual. You talked about a CMS practice of using the lower bound, right?
A. No, you were right the first time. I cited both to the manual and also to their practice.
Q. All right. And it's correct, Dr. McCrary, that the CMS Manual does not require the lower bound be used in all cases, right?
A. It has language that might be taken to suggest exceptions. That's not my understanding from their practice. But, yes, the manual seems as though it is a bit open-ended.
Q. The manual says that in most situations the lower bound should be used, right?
A. I don't have the manual in front of me. I take it that you're quoting from it faithfully, so I'll just take you at your word.
Q. So, Dr. McCrary, you're agreeing for purposes of your

testimony today that the manual says that only in most situations is the lower bound used, according to the CMS Manual, right?

A. Well, I'm not really sure what happens if it turns out you're not quite using the correct language and then I testify that you are. So I don't necessarily want to say yes, but, again, if you want me to accept that as a hypothetical, I'm happy to.

Q. And the manual also says that reviews to assist law enforcement with the identification, case development, and investigation of suspected fraud or other unlawful activities may use different sampling methodologies, right?

A. I don't remember that passage. Again, I don't doubt that you're quoting from the document, but that's not a passage that I recall reviewing sitting here today.

Q. Dr. McCrary, can you just open up PTX-260, please. And my only question for you is going to be can you just confirm that that is a version of the CMS Manual that you have been referring to.

A. Yes, this appears to be.

Q. Dr. McCrary, you have not cited any textbook or any peer-reviewed journal article stating that statistics always requires using the lower bound of a confidence interval in a circumstance like this one?

A. No, I've not.

Q. And aside from CMS, you're not aware of examples in which agencies or entities other than CMS use the lower bound, right?

A. I myself don't have personal experience with investigations that involve sampling except in the CMS context. So what I was trying to do was to point to things that I knew to be correct and the CMS example is the example with which I have familiarity.

Q. And you're not aware of examples in which agencies or entities other than CMS use the lower bound, correct?

A. As I said, I don't have direct experience with investigations by other regulatory agencies. That is to say I'm not familiar with the processes that are followed for other investigations.

Q. And so as a result of that, you're not aware of examples in which agencies or entities other than CMS use the lower bound, correct?

A. That's correct. I wouldn't have experience with respect to agencies that I didn't have experience with respect to.

Q. Now, Dr. McCrary, your research addresses real-world problems with real-world data. And, again, I think you said yesterday you have only written one theoretical paper regarding statistics in your lifetime, right?

A. I believe that was my testimony yesterday yes.

Q. And in all of that real-world work, have you ever

advocated for the use of the lower bound of the confidence interval that you had developed?

A. I can think of contexts where that's an aspect of the consideration, but I have never been in a position of writing an article where the consumer of that information would then be in a position of asking for money damages.

Q. But, Dr. McCrary, can you answer my question, please, which is: In all of the real-world work that you testified about yesterday, you've never once advocated for the use of the lower bound of a confidence interval that you had developed, right?

A. No. So I was trying to be clear, and apologies if I wasn't. I have never been in the context in my research that the consumer of statistical information here would be in and, no, I have not for that reason ever advocated the utilization of the lower bound of a confidence interval.

Q. Okay. Dr. McCrary, turning to monoline allocation issues, your opinion is that Dr. Snow could have explored using sampling on a settlement-by-settlement basis to improve the reliability of his monoline estimate, yes?

A. Yes, that's correct.

Q. And your opinion is that sampling from the population of interest to achieve a 5 percent point maximum margin of error on a count-based breach rate would have only required a total of 1,330 loans?

A. Yes, that's correct.
Q. And you offered that opinion in this case, right?
A. Yes, I did.
Q. And when you offered that opinion, you didn't know how much it would have cost to re-underwrite a loan, right?
A. No, I was not drawing upon a specific number in terms of cost.
Q. And you weren't drawing on a general number either, right?
A. No. I was simply reporting what Dr. Snow's methodology would involve had he done sampling on a monoline settlement by monoline settlement basis.
Q. And at the time you offered that opinion about 1,330 loans, you didn't know how much the trust or PRMI had spent on re-underwriting in these cases, right?
A. That's correct.
Q. And during your deposition, Dr. McCrary, we discussed a declaration that Mr. Alden signed in which he calculated the approximate cost to re-underwrite a loan in this case, yes?
A. I have recollection of that document, yes.
Q. And Dr. -- and Mr. Alden -- I'm sorry. And Dr. Snow discussed that declaration in his supplemental report, right?
A. Yes, I believe that's correct.
Q. And that was a supplemental report that Dr. Snow had

issued before your deposition in this case, right?
A. Yes, that's also correct.
Q. But at least as of the date of your deposition, you couldn't remember ever having even read Mr. Alden's declaration, right?
A. I believe that might be right, but -- this may sound funny, but I don't actually remember not having remembered that. But I take it at your word that you probably asked me that and I probably said I don't remember at that time.
Q. And have you seen it since?
A. I believe that it was included in the list of the documents that you might draw upon and that I laid eyes upon it. I forget which day, but relatively recently.
Q. Okay. And other than that, do you recall seeing Mr. Alden's declaration at any point after your deposition?
A. No, I don't recall. I may have, but I don't recall having done so.
Q. So the only time you ever remember having seen or read Mr. Alden's declaration was in the last several days because we disclosed it as part of your examination materials?
A. No. I also recall having reviewed it in the context of the deposition, as we were just discussing.
Q. Well, Dr. McCrary, you just testified that at the time of the deposition, you hadn't remembered seeing it.
A. No, that's not what I testified to or it certainly

wasn't my intent. And I'm not sure that it matters much, but the -- for clarity, what I think is true is that you asked me a question in my deposition about whether I recalled having seen that document. I believe it's right that I said no. I believe it's right that you also then asked me to review that document, that I then did. And subsequent to that deposition, a few days ago I reviewed the same document briefly.

Q. Dr. McCrary, you're saying that we looked at the declaration during your deposition?

A. That's my memory. It might be wrong, but that is my recollection.

Q. Dr. McCrary, we never looked at that declaration during your deposition, right?

A. That's not my memory. But, again, as said, I might be wrong about that.

Q. Okay. And in any event, you're at this point in time aware that Mr. Alden has calculated that it costs the trust about $8,000 to re-underwrite a single loan in this litigation, right?

A. I am aware that that's his testimony, yes.

Q. And across 1,330 loans, that's $10.6 million, more or less?

A. So I'm not sitting here with a calculator, but, again, I'll take it that you've done that calculation correctly.

Q. Okay. And another criticism that you've raised is that Dr. Snow ought to have considered calculating monoline damages on a monoline-by-monoline basis, right?
A. Yes, that's correct.
Q. And you understand that Dr. Snow generated an analysis in this case that attempts to address that criticism?
A. I am, yes.
Q. You've opined that we should disregard those estimates, though, and that they can't be used, right?
A. Those that are based on sampling, yes, I think that's correct.
Q. And part of the reason why you think that Dr. Snow's settlement-by-settlement numbers can't be used is because you believe Dr. Snow should have started with the universe of loans that were insured by each monoline insurer and drawn a sample from that population rather than using a sample that had already been drawn for another purpose and looking to the loans that happened to have been insured by a given monoline insurer, right?
A. There was a lot in that question. Let me just try to clarify my view on this. My view is that Dr. Snow's methodology clarifies that he thinks the sample sizes on a settlement-by-settlement basis are too small. That's why he initially made the move, I believe, to make an assumption, the incorrect one, regarding retrades being the same across

all monoline settlements.

Q. But in addition to the issues of sample size, if I understand what you testified just now, you also had a concern that Dr. Snow had -- should have started with the universe of loans that were insured by each monoline insurer and drawn samples rather than using a sample that had already been drawn for some other purpose, right?

A. Yes. So what I tried to testify to is that stratifying by settlement would have led to an appropriate sample size for each of the settlements that were to be allocated.

Q. And Dr. Snow's failure to generate settlement-by-settlement numbers using samples that had been drawn for that specific purpose is part of the reason you believe those numbers are not usable, right?

A. I'm not sure I fully understand the question. Could you try asking it again?

Q. I can ask a different one. Dr. McCrary, do you recall testifying about this settlement-by-settlement issue during the *HLC* trial?

A. I do, yes.

Q. And you prepared demonstratives that you used to illustrate your testimony on that issue?

A. Yes, I recall my demonstratives from the *HLC* trial.

Q. And you prepared them because you believed they would be helpful to the fact-finder, right?

A. Yes, that's correct.
Q. You wouldn't have put something in front of a jury that you believed should be disregarded and couldn't be used, right?
A. No, that's correct.
Q. Can you take a look at PTX-461-19, please.
A. Give me just a moment. Thank you. PTX-461-19?
Q. Yep.
A. Yes, I'm there.
Q. And we're looking at a demonstrative from your *HLC* testimony, right?
A. Yes.
Q. And the heading of this slide is Violation of Pillars One and Four?
A. Yes.
Q. And that slide reflects HLC damages calculated from Dr. Snow's work papers on a settlement-by-settlement basis, right?
A. Yes, that's correct.
Q. And it presents breach rates based on samples that had already been drawn for another purpose and just happened to have been insured by a given monoline insurer, right?
A. I'm not sure that I follow.
Q. The numbers on this slide reflect the samples that had already been drawn by Dr. Snow for his original

nonsettlement-by-settlement purpose, right?

A. Well, the first two columns contain counts of the number of loans. They do correspond to Dr. Snow's sample. And the final column presents Dr. Snow's damages calculation. And the slide is included for a specific point and I'm not really sure that I understand your question.

Q. Dr. McCrary, the question is this slide presents breach rates in the final column -- I'm sorry. This slide --

A. No.

Q. Yeah, I apologize. Dr. Snow [sic], this slide presents data based on samples that had already been drawn for another purpose, right?

A. Yes. I think just for clarity of the record, you called me Dr. Snow just now.

Q. I apologize.

A. So the --

Q. It was not intentional.

A. It's okay. So I'm Dr. McCrary.

So the final column pertains to damages, not to breach rates.

Q. Correct.

A. But I did try to clarify in my initial attempt at answering your question that, yes, the sample sizes that are presented here --

Q. Um-hum.

A. -- are the sample sizes that correspond to Dr. Snow's sample, which, yes, was wrong for different purposes.

Q. And those are loans that just happen to have been insured by a given monoline insurer.

Dr. McCrary, before we move on, by the way, the heading of the slide talks about pillars one and four.

A. Yes.

Q. And what was pillar four in *HLC*?

A. Pillar four was what corresponds to pillar five in the presentation of the five pillars that I presented yesterday and in my prior report, that is to say, specifically to be transparent and use justified assumptions.

Q. So pillar four in *HLC* was assumptions and that became pillar five here?

A. Yes, that's correct.

Q. And what's pillar four here?

A. That's what I just told you about.

Q. What's pillar four in this case?

A. Oh, sorry. By "here" I thought you were referring to the pillar four in the document.

Q. I know it gets confusing. In this trial what is pillar four?

A. Pillar four is unbiasedness.

Q. Okay. And what does "unbiasedness" mean?

A. As I tried to clarify in my direct testimony yesterday,

unbiasedness is not something that is intended to convey anything like the license of that term. It's a technical statistical idea and it refers to the proposition that the sampling distribution should be centered at the truth, that is to say, what would be obtained if one had enumerated all of the loans as opposed to sampled from them.

Q. And I think you testified yesterday that one of the ways in which Dr. McCrary -- I did it again -- one of the ways in which Dr. Snow violated pillar number four in this case has to do with the strength of claim issues that you've raised, right?

A. Yes, I believe that's correct.

Q. So when we talk about pillar four and unbiasedness in this case, we're talking about strength of claim?

A. No and yes, I suppose. A "yes" in the sense that strength of claim is something which -- strength of claim defenses would be something that in the PRMI case would lead to bias and in particular for damages to be overstated, but it wouldn't be limited to that.

Q. I --

A. -- would be "no."

Q. I think -- I'm sorry. Go ahead.

A. No, it's okay. I was just trying to clarify that yesterday in my direct I also tried to be clear that another aspect of bias is the estimate for the monoline settlements

because the assumption that gets invoked in order to support the monoline settlement damages numbers is the homogeneity assumption, that is to say, that all of the monoline settlements are the same as one another. And I presented evidence to the contrary and argued specifically that that means that that assumption is false; and if that assumption is false, the estimate that results from that assumption is biased as well.

Q. And that last monoline heterogeneity issue, that was an issue you had in HLC, too, right?

A. Yes, that's correct.

Q. But what's new in this case about pillar four in your opinion is strength of claim, right?

A. I think you're asking me the same question you asked before where I said the answer was yes and no.

Q. Let's move on. So, Dr. McCrary, you believe that Dr. Snow's allocation approach suffers from various flaws, right?

A. Yes, that's correct, and I've tried to lay those out.

Q. And one of them is that, as we said, it doesn't account for strength of claim, right.

A. Strength of claim and defenses, yes.

Q. And you believe it's a flaw that Dr. Snow doesn't take into account in particular that the claims brought by the trusts and monolines during the bankruptcy proceedings may

not have had an equal probability of success on every loan due to the differing characteristic of the loans and trusts in which they were securitized, yes?

A. Yes. I'm not 100 percent sure, but you sound to me like you're quoting to me from my own report.

Q. And yesterday you characterized that as I think a fundamental problem in Dr. Snow's analysis?

A. I might have said that that was a fundamental problem. I don't recall that language specifically, but that's not inconsistent with my opinion.

Q. And that's not an opinion that you offered in Wave One, right?

A. That's correct.

Q. So in Wave One you were representing how many parties?

A. I don't recall, but we could look it up.

Q. Many parties?

A. I was retained on behalf of I think it's something like 20 different entities, yes.

Q. Okay. And you spent a couple of years in Wave One working for those 20-some odd defendants?

A. I forget the gap in between my initial retention and the trial, but I'll take you at your word.

Q. It was a long time. And during that time you had a job to evaluate the opinions that Dr. Snow had offered concerning statistics and damages, right?

A. Yes, that's correct.
Q. Same assignment you had here, right?
A. I would have said that the scope of my assignment was somewhat broader with respect to the PRMI matter than it was for the HLC matter.
Q. But the engagement that you had in Wave One was to assess Dr. Snow's damages and statistical work and the engagement that you had here was to assess Dr. Snow's damages and statistical work, correct?
A. At a high level that's correct, but I was not asked the question in the *HLC* trial or, better said, I wasn't asked the question in the *HLC* assignment about strength of claims and defenses.
Q. Why not?
A. I don't know.
Q. Did you flag it? It was a fundamental problem with Dr. Snow's analysis. Did you ever raise your hand and say actually there's a whole another pillar that Dr. Snow's methodology violates in a fundamental way, we should maybe include this in my report; did you ever say that?
A. No, but it's also true that strength of claims and defenses is not one of the pillars of statistics.
Q. But it violates one of the pillars of statistics?
A. No. Having an estimate that is biased violates a pillar of statistics.

Q. And you believe that Dr. Snow's failure to take into account strength of claim generated by his estimate, that violates a pillar of statistics, right?

A. That's correct, I do believe that.

Q. And notwithstanding that, at no point in all of your work in Wave One did you raise your hand and say, hey, you know what, I'm issuing reports and I'm offering deposition and trial testimony and maybe we should say something about this fundamental violation of a pillar of statistics, right, never said that?

A. I did not say that, no.

Q. Okay. And can you please turn to DDX -- I'm sorry. Do you have your *HLC* demonstratives in front of you still?

A. I don't. The clerk took them away. Do you want me to get them back?

Q. Yes. Could you?

A. I've got them now.

Q. And turn to slide number 3, please.

A. I'm there.

Q. And this is the slide from *HLC* in which you describe the pillars of statistics that you testified about in that case?

A. Yes.

Q. And there's nothing on this slide about -- that uses the word "bias," right, the word "bias" doesn't appear on this slide?

A. That's correct, the word "bias" doesn't appear on this slide.

Q. And, Dr. McCrary, you said in your direct testimony yesterday that it would have been possible for Dr. Snow to design a method to account for the strength of claims and defenses?

A. Yes, that's right.

Q. You never offered that opinion in any report issued in any case in these actions ever, right?

A. I'm not sure I follow. We've already gone over the fact that that wasn't part of my assignment in *HLC*. And that being said, I think it's right that that's fully consistent with the opinions that I have offered in this trial.

Q. Well, Dr. McCrary, you testified yesterday and I understand that you believe it was a mistake that Dr. Snow never considered strength of claim, right?

A. Yes.

Q. And that's one thing, but it's another thing to say that it would have been possible for Dr. Snow to design a method to account for the strength of claims and defenses, right, that's a separate question?

A. I suppose you could -- I suppose you could draw the lines in that way. I don't see it that way, but I understand the distinction you're trying to draw.

Q. And do you have your report from this case in front of

you?
A. I don't, but I'm sure I will shortly.
Q. Do you recall -- well, I'll just ask the question. Do you recall anywhere in your report in this action offering the opinion that it would have been possible for Dr. Snow to design a method to account for the strength of claims and defenses?
A. I don't know sitting here today whether or not the report contains language that's consistent with the line-drawing that you're doing now. It might and so I wouldn't wants to say affirmatively it does not. But I don't think of it as distinct from the opinion that I've submitted and the written report.
Q. Okay. Can you open PTX-258.
A. Yes, I have it in front of me. Which page would you like me to go to?
Q. The page in which you express the opinion that it would have been possible for Dr. Snow to have designed a method to account for the strength of claims and defenses.
A. And to be clear, I'm not trying to say that I said exactly what it is that your question is about. I'm just saying I don't recall every single word in the report, but it's not in my view inconsistent with the opinion that I submitted.
Q. That's okay. Can you answer my question?

A. Would you like for me to -- I think you're asking me to re-read my report right now.
Q. I would like you to identify the page in your report in which you express, in words or substance, the opinion that Dr. Snow could have designed a methodology to account for the strength of the claims and the weakness of claims.
A. I want to be respectful of everybody's time, but at the same time I don't really know how to answer your question without flipping through page by page.
Q. I think with the Court's permission, you can take a minute to do that.
THE COURT: You can go ahead and review your report.
THE WITNESS: Okay.
(Pause in proceedings.)
THE WITNESS: So the portion of the report that is about the questions that you're asking about is at the very end and looking over the specific language that I used in paragraph 160, that's I think closest to the mark in terms of what you're asking about. I don't think it draws the same line that you do. So in particular it highlights that Dr. Snow doesn't take account of the distinctions in his methodology. So the specific language is almost exactly that which I just read.
BY MR. NESSER:

Q. Okay.
A. But it doesn't then reach the extra line-drawing that you were just engaged in in your question saying is it possible. That being said, if someone had asked me is it your view that it would be possible to account for these distinctions in this methodology, I think the answer to that is yes.
Q. Well, we know that because you said that yesterday for the first time. So, Dr. McCrary, you have not described a methodology --
MR. NICHOLSON: Your Honor, move to strike counsel's last response. He was testifying and badgering the witness, not asking a question.
THE COURT: Overruled.
BY MR. NESSER:
Q. Dr. McCrary, you've also not described a methodology for determining which strengths and weaknesses should be taken into account, right?
A. That's correct, I've not.
Q. And is it your understanding from -- I'm sorry. It's your understanding from the expert reports of Mr. Woll and Mr. Burnaman and Mr. Hawthorne that there was not an equal probability of success on every loan relevant to the case, right?
A. That is my understanding, yes.

Q. And you rely on those experts for the conclusion that there was not an equal probability of success on every loan in every trust, right?
A. That's correct.
Q. As a statistician, you don't have any independent basis to opine on whether one loan or another loan on one issue or another issue or a defense or a claim had a higher or a lower probability of success, right?
A. That's correct. So my expertise is in economics and statistics, and I am relying on other experts for their view regarding strength of claim and defenses.
Q. And one of the things that you rely on the experts for is, let's use as an example, Mr. Woll's opinion that a reasonable litigant in RFC's position would have ascribed less value to claims that were subject to the statute of limitations defense than to equivalent claims not subject to the defense, right?
A. Yes, that's correct.
Q. That's because the probability of success on a loan with a statute of limitations defense would have been lower?
A. That's my understanding, yes.
Q. And if somebody had wanted to take into account the probability of success on loans with a statute of limitations defense, one would need an estimate of the probability of success on that defense, right?

A. That's correct. You would apply -- so this is the point where I think you're drawing a distinction in your prior line of questioning that I don't really see. So I think the adjustment would be straightforward, which is to say if a defendant had loans that were in trusts which had a statute of limitations defense, I think it would be appropriate for those loans to have a damages estimate that would have a haircut and for defendants who didn't have those same defenses to not receive that same haircut and instead for their damages to be more.

Q. And the haircut would reflect how likely a party would have been to prevail on a statute of limitations defense, right?

A. Yes. And this is I think what you were getting at with respect to your question in regards to probabilities.

Q. So how would somebody determine the likelihood of success on a statute of limitations defense?

A. So it's my view that that would not be something that Dr. Snow would have done on his own and he would have instead relied upon other experts to perform an estimate of their assessment of the probability of success.

Q. Wait. You have expressed the view today and yesterday that it would have been feasible for Dr. Snow to design a methodology that took this into account, right?

A. That's correct. And actually in this line of

questioning you and I have clarified what that methodology would be. I think it's fairly obvious.

Q. And where would ou have gotten the probability of success on a statute of limitations defense from?

A. Again, so it's not my view that you would have had to have had a statistical estimate of that. Instead one could have used a probability that could have been obtained from another expert, for example.

Q. What kind of expert?

A. Someone who had expertise with respect to, for example, statute of limitations defenses and to the extent that they were present in some trusts and not in others.

Q. A lawyer?

A. Someone who had that expertise, who, yes, could be a lawyer.

Q. So you would ask the lawyer, hey, can you estimate for me the probability of success on a statute of limitations defense?

A. I would probably ask someone who had relevant expertise, so not just any lawyer, but someone who had experience in the area, but yes.

Q. And how would you know whether that -- the response that you got back was accurate?

A. So usually when you, as an expert, say I'm presenting a methodology and that methodology uses an input that is

another expert, you don't necessarily say that their analysis is correct. You simply say that you're relying upon that.

Q. Right. But your opinion is that it would have been possible for Dr. Snow to design a methodology that took into account strengths and weaknesses, right?

A. That's correct, yes.

Q. And in order for it to be possible to design such a methodology, it has to be possible to get accurate assessments of the likelihood of success on each of those probabilities, right -- on each of those claims and defenses, right?

A. Yes, I believe that that's correct, yes.

Q. So when you testified that it would have been possible to design such a methodology necessarily you're expressing a view that it would have been possible to get accurate measures of the probabilities of success, let's say, on a statute of limitations defense, right?

A. Yes. I think the clearest way to say this is what Dr. Snow's methodology does currently is that it's taking a stance also on the probability of success and it's saying that it's actually equal for all loans, and it's my view that you don't have to make that assumption and that it would have been appropriate to consider other assumptions and in particular it would have been appropriate to consider

using as an input an approach that would have allowed for a haircut for defendants who had loans in trusts that had stronger defenses, as an example.

Q. Would it have been possible to get reliable, accurate estimates of the likelihood of success on a statute of limitations defense as to the loans in this case?

A. I don't see what would have prevented someone from having offered that as an input into Dr. Snow's methodology. That being said, I'm not trying to say that I myself have that knowledge or know of there being such a probability in the record.

Q. You have no idea whether it's possible to accurately assess the likelihood of success on statute of limitations, right?

A. That's not a domain of my expertise and so I wouldn't want to say that I have knowledge about that now.

Q. Okay. And if somebody were to give you an estimate of their assessment of the likelihood of success on statute of limitations, that uncertainty would be -- would that be equivalent to a bias issue or a margin of error issue or both?

A. So the estimate from the expert that you're suggesting is not one that I take to be associated with sampling, so therefore it would have neither bias nor margin of error considerations attached to it.

Q. Okay. But it might just be completely wrong, right?
A. Again, if you put forward an analyses in which you are relying upon the view of another expert, you are doing exactly what that sounds like, you're relying upon their expertise.

So if you were trying to understand whether or not that number was likely to be correct, you would review, for example, their qualifications and want to make sure that they, in fact, had the experience that would be appropriate with that opinion, but it would not be a statistical inquiry whether or not that number was correct.

Q. But if the lawyer told you that he or she didn't have full confidence in the estimate, that's something you would have to take into account, right?
A. I want to make sure I understand your hypothetical. I think you're asking me if I was being asked to submit an opinion that was relying upon another expert and that expert had been retained by the same counsel that had retained me, but that counsel expressed skepticism regarding the qualifications of the expert upon whom I was to rely, what would be my reaction?
Q. Not the qualifications. If the expert expressed uncertainty about the accuracy of his or her assessment of the likelihood of success.
A. Oh, I'm so sorry. Before I thought you were saying that

counsel informed me as to their uncertainty. But if I understand you correctly now, you're saying the expert who submitted an opinion --

Q. Yes, correct.

A. -- expresses uncertainty.

Okay. If the expert were to express uncertainty as to their estimate, I would probably do what I do when I go to the doctor and I would ask them can you give me a range. So if there is uncertainty, what -- in your experience, what are the numbers that are low, what are the numbers that are high.

Q. I see. Okay. And in your report you testified about statute of limitations as a strength and weakness issue, right?

A. I described that, yes, as one of the defenses that as I understood it was relevant.

Q. And you also in your report and in your testimony talked about underwriting representations as being a factor relevant to strengths and weaknesses, right?

A. Yes, I believe that that's correct as well.

Q. And, again, an underwriting representation on that issue, again you would presumably have to go out, find an expert, ask that expert to give you their assessment of the probability of success on that issue, and if they were not sure, you would ask them for a range, right?

A. I'm not exactly sure what you mean by they are not sure. What I would be asking them for is what do you think is a good estimate. If they expressed concern about the scope of the assignment, they felt like they had a hard time giving a number, I would want to take that into account and I would say, well, do you feel like you could actually do something like express a low and a high number --

Q. Um-hum.

A. -- with some confidence.

Q. What if they said they couldn't?

A. Then I'm not sure that such an approach would be workable in the end.

Q. Okay.

A. If they thought that it was genuinely not possible --

Q. Okay.

A. -- to come up with some way to characterize the strength of claims or defenses, then I think it's right that it wouldn't be a feasible approach.

Q. And in addition to statute of limitations and trust reps we were just discussing, your report also talks about no-fraud representations and fraud disclaimers as two other strength of claim issues, right?

A. Yes, that's correct.

Q. And, again, as to those two, you could go out -- or you would have to go out, find an expert, ask them what their

assessment was or what their range of assessments were and so forth, right?

A. Yes, it's the same basic approach.

Q. And so we've talked about, I think, five different issues, right, statute of limitations, underwriting rep, no fraud, fraud disclaimer, and, I'm sorry, we didn't talk about there's a monoline issue as well that you talk about in your report?

A. I believe that's correct as well.

Q. Okay. And so those five issues. And it's possible, Dr. McCrary, that if a party won or if a party prevailed on one of those five issues, that that would impact the likelihood that the party would prevail on one or more of the other issues, right?

A. You're asking me about the expertise of an expert upon whom I would intend to rely. So that's not part of my expertise.

Q. So as far as you know -- well, let me ask it this way. You can't exclude the possibility that if a party were to prevail on one of the five issues, that that would increase the likelihood that it would prevail on one or more of the other of the five issues, right?

A. That's correct. That's not part of my expertise and in light of that I wouldn't be in a position to exclude that as a possibility.

Q. And, Dr. McCrary, am I correct in understanding that that kind of an issue, where an increase in one of the factors might impact the likelihood on the others, is that referred to in statistics as correlation?

A. No, that's a different underlying idea.

Q. So what would you call this issue of when one of the factors might influence the outcome on another of the factors?

A. I suppose I see how you're describing that as correlation. You're just simply saying, if I understand you correctly, that the one event influences the other event. In statistics we think of correlation and population in a sample context. You're describing a context where it's a single number as opposed to either a dataset or an infinite set of possible databases, which is usually how statistics refers to that idea. But I think I understand what you're getting at. So with that understanding I would say, yes, that's about correlation.

Q. Okay. And you could ask -- so am I correct in understanding that you would have to ask this expert we've been talking about whether there was correlation between these five issues, right?

A. I'm not sure that you would have to. Again, this is probably related to the fact that, you know, I was not asked to do this as part of an affirmative assignment.

Q. Um-hum.
A. These are the kinds of things that I would want to consider, but I'm actually not sure that you would have to ask such an expert to do that.
Q. Well, if the expert had come to you and said, hey, here are ranges of probabilities on each of the five issues we've been discussing, but, Dr. McCrary, I just want you to understand that if I win issue number one, my likelihood of success on issue number two goes up by 50 percent, right, if an expert had told you that, you would need to take that into account in some way in your methodology, right?
A. That stands to reason, yes, that if they expressed that view, you would want to take that into account as well, yes.
Q. So if they expressed that view, you would need data on all of the correlations, right?
A. No, and this gets back to the distinction that we were just drawing between the views of the expert upon whom you would rely in such a context and the other concept of a dataset. The expert here would not be submitting a dataset. I don't believe the expert here would be submitting their view.
Q. I apologize. I didn't mean "data" in that sense, but we can continue.
So, Dr. McCrary, we've stalked about five strength of claim issues. You don't contend those are the only

issues as to which RFC's likelihood of success could have varied as among trusts or loans, right?

A. That's correct. I would not have the expertise to exclude other possibilities.

Q. And, in fact, you relied on Mr. Woll, right?

A. That's correct, I relied on Mr. Woll.

Q. And you read Mr. Woll's testimony at trial in this case and Mr. Woll said with respect to repurchase claims as of the settlement period, the issues that he had focused on in his report were not, in fact, the only issues, right, remember that?

A. I do.

Q. Okay. And you also relied on Mr. Hawthorne, right, in respect of these strength of claims issues, right?

A. That's correct, yes.

Q. And Mr. Hawthorne also discussed the existence of other strength of claim issues, right?

A. I believe that's also correct. Again, this isn't my expertise.

Q. Um-hum.

A. But I am aware of testimony along the lines of your question.

Q. And you reviewed Mr. Woll's trial testimony, you said?

A. I believe that's correct, yes.

Q. Did you review Mr. Hawthorne's trial testimony?

A. I don't recall having done so, no.
Q. Why not?
A. I don't know.
Q. Okay. And Mr. Hawthorne, I will represent to you, testified that causation and materiality and election of remedies and other breach disputes also would have presented strength of claim issues either on a trust or loan basis. Okay?
A. Okay.
Q. And you didn't discuss those issues in your report, of course, right?
A. No, I did not.
Q. And you didn't discuss them in your testimony because you didn't even read Mr. Hawthorne's testimony, right?
A. I didn't discuss those in my testimony, no.
Q. Okay. And you have no idea, Dr. McCrary, whether PRMI's loans were disproportionately subject to a causation defense, right?
A. I have not reviewed any evidence along those lines and so, no, I don't have any sense of that.
Q. You have no idea whether PRMI's loans were disproportionately subject to the other defenses Mr. Hawthorne talked about, causation, election of remedies and so forth?
A. That's correct, I don't know that.

Q. For all you know, if someone had considered those issues, PRMI's damages allocation would have gone up, right?
A. I suppose that's possible. I've not seen any evidence of that and haven't seen that Dr. Snow considered the possibility. But what you say is I think strictly speaking correct.
Q. And you testified yesterday that had Dr. Snow taken strength of claim into account in his allocation, it would have -- I'm sorry.

You testified yesterday that Dr. Snow's failure to take strength of claim into account in his allocation resulted in a biased estimate that operated against PRMI's interest, right?
A. That's correct, yes.
Q. And in doing so, you made an implicit assumption, didn't you, that every PRMI loan has the same quality in terms of the exposure to causation and materiality and election of remedies and other breach disputes, right?
A. No. So what I tried to testify to was as follows:

First, that unless every loan has the same strength of claim and defenses, then the methodology that Dr. Snow has put forward is going to be biased for specific defendants.

Second, that the available evidence that I presented suggests that the strength of claims and defenses

is something that weighs in PRMI's favor.

However, just now you've clarified that it's not true that I'm trying to say that those are the only factors. So in that context, I think I would say it's possible that there would be other factors which would push against the conclusion that estimates for PRMI are overstated.

And the sharpest way to say my opinion is that the evidence associated with the three considerations that I put forward suggests that PRMI's damages estimate is overstated.

Q. Are you aware of any principled basis to have taken into account some defenses, but not others?

A. I'm not sure that I know what you mean. It is the case that in general one ought to look at defenses and I would trust in the advocacy process to reveal which ones ought to be the focus, especially those for which there is evidence.

Q. And so you're not testifying that the four or five issues you talked about in your report, that those are the only issues that one would have to take into account in a strength of claim methodology, right?

A. That's correct. I'm not trying to say that I've enumerated all of the things which might go into strength of claim or defenses.

Q. Now, Dr. McCrary, it's possible that the margin of error -- you said -- let me ask a different question.

As a non-lawyer statistician, Dr. McCrary, you

have no basis to opine on the extent to which assigning estimates of likelihood of success on any given defense would require speculation, right?

A. I'm not really sure that I understand the question. To be clear, what I've articulated is a position in which experts frequently find themselves, where one expert will advance an opinion that relies upon the opinion of another.

When that's true, it's right that if the opinion upon whom one is relying, if that opinion is deemed to be speculative or somehow there's testimony that it is speculative, it's, of course, right that the expert who is relying upon that opinion, their analysis falls in the sense that they have relied upon them.

But it's not the case that I would have the expertise to describe whether it would be speculative.

Q. So if there was testimony, let's say, in RFC's bankruptcy that an attorney would have to assign highly speculative percentages to various claims and defenses and that doing so would result in an end product little better than guesswork that provided no meaningful guidance, if that testimony had been offered in the bankruptcy, you would have no basis to dispute that, right?

A. Again, I'm not here in the position of Mr. Woll and the experts who would have expertise with respect to strength of claims and defenses. I'm relying upon their testimony.

Q. And as a statistician, if it were the case that making those assessments would be speculative and guesswork that provided no meaningful guidance, if that were true, do you believe that it would still be possible to generate a methodology that took into account strengths and weaknesses?

A. Of course. So the methodology that Dr. Snow has put forward has already taken a stance with respect to strength of claims and defenses. It simply asserts that all of the loans in all of the trusts all have equal probabilities of success.

What one can do is one can devise a methodology that takes as an input what those probabilities are and whether or not it's right that the probabilities in question are determined by the trier of fact to be speculative, that's something the methodology doesn't have to take a view on at all.

It simply says here's a methodology that accepts as an input a factor that is to be applied to loans that are in some trusts that a particular defendant might be in, which might have a particularly favorable configuration of claims and defenses or a particularly weak configuration of claims and defenses.

Q. Dr. McCrary, do you remember testifying yesterday that there are situations in which a margin of error can be so wide that it's just no longer informative regarding the

bottom-line question, the estimate is no longer informative?
A. Yes, that's correct.
Q. And you testified that it's possible for margin of error to be so wide that it conveys no additional information above and beyond what you have before you engaged in the sampling exercise, right?
A. Yes, that's correct.
Q. And so in the same way, if this hypothetical legal expert we have been discussing came to you and said the estimates I'm about to give you are no better than guesswork and provide no meaningful guidance, but here are some ranges anyway, in that situation do you believe as a statistician it would be appropriate to use those numbers and come testify about them in a courtroom?
A. If the available expert testimony upon which I was being asked to rely in such a context were consistent with what you just described, then in that context I would have probably approached the problem the way that Dr. Snow did, that is to say, if there is genuinely no ability to have any assessment of the relative strength of claims and defenses, then I think it's right that you can't actually take that into account. But setting that aside, I would say that you could design a methodology that would use those numbers as inputs.
Q. Dr. McCrary, in *HLC* the point estimate on Dr. Snow's

trust allocation was approximately $5.8 million. Do you recall that?

A. I don't actually recall the figures off the top of my head, but if you want for me to accept that as a hypothetical, I'm happy to.

Q. Can you just pull out PTX-461. Those are your demonstratives in *HLC*.

A. I'm there.

Q. And slide 13.

A. Yes.

Q. Does that refresh your recollection that Dr. Snow's point estimate on the trust allocation in *HLC* was approximately $5.8 million?

A. Yes, $5.842 million.

Q. Okay. And would you turn to slide 29.

A. Yes.

Q. And does that refresh your recollection that Dr. Snow's point estimate on his monoline allocation in *HLC* was approximately $34.8 million?

A. Yes, 34.808 million.

Q. So the $5.8 million trust allocation in *HLC* is approximately 14 percent of the total damages allocation that Dr. Snow calculated, right?

A. I'm happy to assume that you did the arithmetic on that right.

Q. Okay. Dr. McCrary, with respect to the trust settlement, if we analogize Dr. Snow's methodology to a car, you would say that the car has some problems, like maybe the windows don't go down or something like that and that it's in need of a tune-up, right?

A. I think I recall testimony along those lines that I offered at the *HLC* trial, yes.

Q. So you would agree with the statement that I just asked you about?

A. Yes, I think that that's right.

Q. Okay. And you agree as well that Dr. Snow's trust settlement analysis has some problems attached to it, but that you don't think those problems are something that would render the trust settlement analysis unusable, right?

A. That's right. I think that the trust settlement analysis, setting aside the strength of claims and defenses, is one that is workable.

MR. NESSER: I have nothing further, Your Honor.

THE COURT: Thank you, Mr. Nesser.

Mr. Nicholson. You know, I suppose this might be a good time for a morning break. Does that sound like a good idea?

MR. NICHOLSON: That's fine, Your Honor.

THE COURT: It's 10:30. We'll come back at 10:45. Court is briefly adjourned.

(Recess taken at 10:31 a.m.)

* * * * *

(10:48 a.m.)

IN OPEN COURT

THE COURT: Mr. Nicholson.

REDIRECT EXAMINATION

BY MR. NICHOLSON:

Q. Good morning, Dr. McCrary. Can you hear me okay?

A. I can now.

Q. Great. I'd like to ask you a few follow-up questions if I could. Okay?

I would like to start by asking you about the issue concerning the relative strengths of claims and defenses across the loans and trusts. By way of background, can you remind me what assumption Dr. Snow implicitly made about the strength of claims and defenses across loans and trusts?

A. Implicitly he makes the assumption that the strength is equal across all loans and all trusts.

Q. And did he provide any evidence supporting that assumption?

A. No, I'm not aware of any analysis of that question.

Q. And if that assumption is wrong, then what's the implication for his damages estimate?

A. Unless it's correct, the implication would be that it

would be biased for specific defendants. Those who had relatively better positions in the sense of the trust that they were in had either weaker claims against them or stronger defenses, their estimate of damages would be overstated and vice versa for other defendants.

Q. Thank you. Now Mr. Nesser asked you a number of questions about other defenses that might have been raised in the bankruptcy. Do you recall that generally?

A. I do.

Q. Mr. Nesser mentioned a causation defense. Do you recall that?

A. I do recall him asking me about that, yes.

Q. And he mentioned an election of remedies defense. Do you recall that?

A. I do recall that as well, yes.

Q. Okay. And does the fact that there may have been other defenses change your view about whether Dr. Snow has a basis to assume that the strength of claims and defenses was the same across loans and trusts?

A. No, it doesn't.

Q. And why is that?

A. Well, the fact that there might be other considerations doesn't somehow justify the assumption that there are no differences. In fact, the evidence that I pointed to I think confirms beyond a doubt in my mind that there are

differences in terms of the strength of claims and defenses, at least if the testimony of Mr. Woll is correct. And I've relied upon that for that opinion.

So what that would mean is that there's strong evidence that those considerations would differ. Then saying that there might be other factors as well actually would be more likely to amplify that. It would be unusual for somehow other considerations to somehow have a countervailing effect and for those two things to cancel one another out in such a way for all defendants to be in the same position.

Q. And after you issued your report in this case, did Dr. Snow issue a supplemental report?

A. He did.

Q. Okay. And in his supplemental report, did Dr. Snow ever assess the percentage of PRMI loans subject to causation defenses?

A. No, he did not.

Q. In his supplemental report, did Dr. Snow ever assess the percentage of PRMI loans subject to election of remedies defenses?

A. No, I don't believe he did.

Q. In his supplemental report, did Dr. Snow offer any opinion that considering a causation defense or an election of remedies defense would cause PRMI's damages to go up?

A. No, I don't believe he did.
Q. Now, Mr. Nesser also asked you a series of hypothetical questions about I believe a lawyer expert who was supposed to have told you that estimating the probability of success on any of these issues was completely speculative and guesswork. Do you recall that line of questions generally?
A. I do.
Q. Now, in Dr. Snow's report, did he cite any expert report for the proposition that estimating the probabilities of success was completely speculative and guesswork?
A. No, I don't believe that he did.
Q. Okay. And Mr. Nesser also asked whether you offered this opinion regarding strength of claims and defenses in the Wave One cases. Do you recall that generally?
A. I do.
Q. Now, was your assignment in this case different than it was with respect to the First Wave cases, like the *HLC* case?
A. Yes, it was. As I told Mr. Nesser, my scope of assignment was somewhat broader in this case than it was in *HLC*.
Q. And are you aware that in the *HLC* case there was a damages expert named Dr. Torous?
A. I am aware of that, yes.
Q. And are you aware that he addressed different issues than you did?

A. I am aware of that as well, yes.
Q. Okay. And Mr. Nesser also asked you about your testimony from the *HLC* case regarding the trust settlement and I think comparing it to a car. Do you remember that?
A. I do recall that, yes.
Q. Okay. And I think when you responded to that and how it applies here, you said something like, and you can correct me if I'm wrong, but setting aside the strength of claims and defenses issue, that's more or less your opinion here. Is that generally right?
A. I think that's correct, yes.
Q. Okay. And you said, "setting aside strength of claims and defenses." So can you explain what you meant by that?
A. Yes. What I meant by that is that if you are considering not just the trust settlement criticisms that I advance specifically, that is to say, the second portion of the opinion that I described in my direct testimony, but you're also considering strength of claims and defenses, that would be a consideration that would lead to the conclusion that the estimate of damages for PRMI was overstated, as I tried to clarify in my direct.
Q. And that's the bias issue you were referring to earlier?
A. That's correct.
Q. Okay. Thank you.
Now, Dr. McCrary, I'd like to turn briefly to an

issue that Mr. Nesser raised yesterday. Okay? Do you recall that Mr. Nesser asked you a series of questions about Dr. Snow's analysis of breach rates for the NDS trusts?

A. Yes, I do.

Q. Okay. And in particular, he asked you some questions about Dr. Snow's conclusion that because NDS trusts have similar vintages and product types to RFC trusts, that he concluded that they have very similar breach rates. Do you recall that line of questioning generally?

A. I do.

Q. Okay. And Mr. Nesser also asked you some questions about your opinions here that because the monoline settlements are different in terms of vintage and product type, that you can't assume that they have the same breach rates. Do you remember that generally?

A. I do.

Q. Okay. Now, just at a high level, is there a difference between what you have to do to show that two populations are the same versus what you have to do to show that two populations are different?

A. There is. And maybe my testimony wasn't as clear as it could have been on this point, but what I tried to testify to in my direct was the following: And I believe I used the word "asymmetry" at that time and that's the right way to understand that.

If you're trying to see whether or not two populations are the same, you would need to do a relatively searching inquiry to understand whether they were the same across a wide variety of dimensions. It wouldn't be sufficient to say I checked two of them and so we should hope that they are similar for the other.

If you're instead trying to see whether or not there is evidence that two populations are different, you don't really need to look much further than one or two variables in order to reach the conclusion, oh, actually these two things are pretty different from one another.

In my direct when I tried to clarify that, I used the example of Minnesota versus Alabama, two places that I take to be very different from one another. That being said, you could almost surely find two variables that are similar between the two. That wouldn't necessarily establish that they were the same, however.

Q. And so if Dr. Snow wanted to conclude that the NDS trusts and the RFC trusts had the same breach rate, would he have needed to look at factors beyond vintage and product type?

A. Yes.

Q. Okay. And with respect to your opinion regarding whether it's reasonable to assume that monoline settlements had different -- strike that.

Regarding your opinion on whether it's reasonable to assume that the monoline settlements each had the same breach rate, was it sufficient for you to look at differences in vintage and product type to assess that assumption?

A. I believe that it was. It's also consistent with the fact that Dr. Snow's own settlement factor varied substantially across those.

Q. Can you explain that a little bit more. Why was it sufficient for purposes of your analysis to look at those two factors, whereas it was not sufficient for purposes of Dr. Snow's NDS analysis, just to close up the loop?

A. The general idea of similarity of two populations is one that occurs in pretty unusual circumstances. More commonly it's right that two different populations are quite different from one another.

So, if you will, think of a context that many of us have even seen in RMBS litigation where there is an assertion made that the sample is representative of the broader population. There you would often engage in a comparison between the sample and the broader population, and you would do that in a searching way, across a wide variety of characteristics.

If instead you were trying to understand whether or not one sample might be different from another sample,

you actually don't need to do as deep of an investigation of that because as soon as you reach the conclusion that a few variables are different, the bulk of the evidence immediately persuades that those two are, in fact, different.

And that's actually the situation that we find ourselves in here and that's what I was trying to communicate with the word "asymmetry." It depends upon which direction you're trying to go, how searching that inquiry needs to be.

Q. Thank you. Yesterday as well as today Mr. Nesser asked you a series of questions about the number of pillars of sampling that you have discussed in particular cases. Do you remember that generally?

A. I do.

Q. Okay. And just for clarity, can you explain why you focus on particular pillars in some cases and particular pillars in other cases.

A. It's an attempt to communicate. It's really an expositional matter more than anything else. I would say that the pillars that I describe in a particular context are the ones that are relevant for the discussion of that case. If there is not relevance of a particular pillar, I wouldn't go to discuss that in a particular case.

Q. So the fact that you've focused on particular pillars in

particular cases, does that mean that the underlying pillars of statistics as a discipline change?

A. No, not at all.

As an example, for example, the trust settlements, in my view, the methodology put forward violates pillars one through three. It would have been a mistake to have organized those as pillars one, three, and five because it would have been just more complicated to describe it. So I would have reorganized it so they would be the first three as opposed to some other subset.

So in general I would say that it's not my view that the pillars that I have described are squarely attached to the number. Instead it's about the idea. And if you look across the body of my testimony regarding the pillars of statistics, I've always expressed the same ideas.

Q. And following up on this, Mr. Nesser asked you a series of questions about the pillars that you discussed in the *HLC* case in particular. Do you recall that?

A. I do.

Q. Okay. Could I ask you to look at your testimony from the *HLC* case. It's at PTX-276.

A. Yes.

Q. If we could have assistance from our friends in the courtroom, that would be helpful.

A. Yes.

Q. Great.
A. PTX-276, I've got that.
Q. Yeah. If you look at the numbers on the bottom of the page, can you turn to PTX-276-21.
A. Yes, I'm there.
Q. Okay. And do you see line 12?
A. I do.
Q. Okay. And do you see that there it says --
MR. NESSER: Your Honor, objection. I don't know on what basis he is reading prior testimony to the witness.
THE COURT: You're not trying to impeach him. So what are you doing?
MR. NICHOLSON: There's been a suggestion by Mr. Nesser there's some sort of inconsistency. I'm going to just ask him what he meant by his testimony here. I can focus on a particular word without reading the testimony.
THE COURT: Well, I think you can ask him a question, but you typically wouldn't use his deposition for any purpose other than to impeach him.
MR. NICHOLSON: Okay. He was asked about this testimony and --
THE COURT: You can say do you recall the testimony.
MR. NICHOLSON: Yep.
BY MR. NICHOLSON:

Q. Dr. McCrary, do you recall testifying in that case that there were -- the four pillars you were discussing were, quote, four of the big five?
A. Yes, I do.
Q. And by "big five," were you referring to the same five pillars that you discussed in this trial?
A. I believe that I was, yes.
Q. Okay. And do you recall that also in your *HLC* testimony you later discuss the concept of bias?
A. Yes.
Q. And is bias one of the pillars that you discuss in this case?
A. It is. It is the fourth pillar in this case.
Q. Okay. So Mr. Nesser also asked you a series of questions about a declaration by one of plaintiff's attorneys named Mr. Anthony Alden. Do you recall that generally?
A. Yes, I do.
Q. Okay. And Mr. Nesser asked you about Mr. Alden's estimate that it costs the trust about $8,000 per loan for re-underwriting. Do you recall that generally?
A. I do.
Q. Okay. And I think yesterday you testified that had Dr. Snow used a non-extrapolated approach, the maximum number of loans he would need for a monoline analysis would

be 95 loans. Do you recall that generally?

A. That's right, corresponding to the PRMI sample.

Q. Right. And 95 times 8,000 is only $760,000. Is that about right?

A. That sounds about right. Again, I don't have a calculator, but I'll assume you did that calculation correctly.

MR. NICHOLSON: Thank you. No further questions at this time, Your Honor.

THE COURT: Mr. Nesser, anything further of Dr. McCrary?

MR. NESSER: Nothing further, Your Honor.

THE COURT: Very good. All right. Dr. McCrary, you're all set.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. Very good. I think it might be advisable to use this time to address any remaining issues. I know there's a pending issue about the Rule 1006 summary. Is there any additional argument the parties have, Mr. Nicholson, Mr. Scheck -- or Mr. Miller, sorry?

MR. NICHOLSON: I'm happy to address that, Your Honor. I know there was discussion yesterday evening about whether the law allows a paralegal to offer a 1006 exhibit into evidence or whether it must be prepared by an expert witness.

I discussed a case cited by plaintiff earlier discussing that a paralegal, you know, is an example of someone who can offer that. And we've provided the Court a letter that is -- it details many cases in which courts have admitted 1006 exhibits from paralegals, prepared by paralegals. We think that makes -- those cases are good law. I haven't found any case to the contrary on that issue yet.

THE COURT: Well, what about the Eighth Circuit?

MR. NICHOLSON: So the Eighth Circuit case that plaintiff cites is a case standing for the proposition that a lawyer arguing the case cannot present, prepare a demonstrative -- I'm sorry, a summary exhibit. And that was rooted in the idea that a lawyer basically shouldn't take his closing argument or her closing argument and summarize it into an exhibit and move it in through 1006.

That's not what's happening here. It's simply a paralegal taking a document that was produced by the plaintiff pursuant to its Rule 26 disclosures, summarizing it in a completely objective way.

It's simply the percentage of loans originated -- the number of loans and percentages per year for the global sample and the PRMI -- I'm sorry, the global population and the PRMI population. It's simply taking an Excel spreadsheet and just adding up the columns and calculating

that.

Now, plaintiff has cited only one case in addition to that Eighth Circuit case, which we think is completely inapt, and in that case they say it involved a paralegal. But what happened there -- it's a case from the Northern District of Iowa -- there was a paralegal nurse who prepared a chronology of medical records for a patient. The lawyer then took that chronology and pulled out the items that the lawyer thought were most favorable to his or her argument and then created a separate summary exhibit, which he then tried to move into evidence. And the Court said that that was not going to be permissible because that was argumentative and it was created by the lawyer.

That's not what we have here. There's no second layer here of the lawyer going in and creating the exhibit based on something that the paralegal initially did.

THE COURT: Wouldn't it be fair to say, though, that no witness in this case will rely on this exhibit, that this exhibit is being prepared for one purpose and that is for a lawyer during closing argument to use it as a document as part of his closing argument?

MR. NICHOLSON: Your Honor, I think that --

THE COURT: "Yes" or "no."

MR. NICHOLSON: It will be used in closing, but I don't --

THE COURT: Is it going to be used by any witness in this case?

MR. NICHOLSON: Here is the key point, and I don't think --

THE COURT: Answer my question first.

MR. NICHOLSON: It is not going to be used by any witness in this case. The witnesses on facts and experts are over.

But the idea that a 1006 exhibit only comes in if it's then specifically used by a fact witness is incorrect. I don't know where that concept comes from. The 1006 rule refers to as 1006 being summaries of underlying documents that are too voluminous to be able to understand or comprehend without a summary. So this is exactly what this is doing. It's summarizing a document produced by plaintiff in this litigation pursuant to its Rule 26 obligations.

And this document, by the way, is presenting basic, basic facts. These are simply the percentages of loans in their own global population by year -- by number and percentage by year. I think it's telling that plaintiff is so strenuously objecting to such basic information. And this is information that no fact witness could testify to.

THE COURT: So the underlying data from which this summary was made is independently admissible?

MR. NICHOLSON: Your Honor, I think it would be.

We're not seeking to admit it, the entire spreadsheet. The document that it's relying on was the spreadsheet produced by plaintiff to us as part of their damages disclosures. I think it's an operative disclosure in discovery under Rule 26. That's how it was understood, I think, by the parties and by the Court when the Court ordered them to do more disclosures about their change in their damages model. I think this is their own statement to us. I think it is admissible.

We're not seeking to admit the entire voluminous spreadsheet with 464,000 loans and there's no requirement that the underlying document be into evidence in order to move the 1006 in.

In fact, plaintiff has taken the opposite position on the trust-level documents. They have told us that we can't move in all the underlying documents. We can only move in the 1006. So we disagree with that, that you can't do it, but it's certainly not true that you have to do it to get in the 1006.

So we think it is admissible. It's highly relevant. It goes to one of the core issues in the case, which is how many loans in this population were sold in early years by PRMI versus the global. It's been a focus of this case that PRMI's loans are older, they are in older trusts, and they, in our view, had less impact on the

settlement because of that. This is simply reflecting those numbers from plaintiff's own damages disclosure.

And so I think it's highly relevant. I think that the -- it's entirely appropriate for a paralegal to testify about how she created this basic spreadsheet and we're happy to have her do that today. She's prepared to do that. We can put her on. It won't take long at all if plaintiff wants to do that.

But there's no reason why this shouldn't be admitted, and I guess I'll leave it there.

THE COURT: All right. Mr. Miller.

MR. MILLER: Good morning, Your Honor.

THE COURT: Good morning.

MR. MILLER: I think the Court has very aptly articulated plaintiff's concerns, so I will endeavor to keep this very brief.

But, you know, literally what's happening here is that this document was created for the purpose of closing. Obviously not created to be used with a witness because there are no remaining witnesses that have been disclosed to be called. So there's no testimony about it. It's -- and our concern is it is a pure ambush document. It's being set up to make a record on appeal and for closing and not in conjunction with a witness.

And just to highlight one of our concerns in

particular, this document is essentially a summary of a summary. And while we view this as a matter of law, I don't think any witness who Primary could call today would be able to lay foundation for the underlying summary or in particular the documents underlying that summary. So we almost have a double foundation issue here.

And just to reiterate what we pointed out in our letter in slightly more detail, the Eighth Circuit appears to be very firm on this point that counsel and those operating at the direction of counsel who are on the legal side of things cannot put in a 1006 -- cannot be the witness who sponsors a 1006 exhibit.

And while I think the main factor is those cases that PRMI cites are outside of the Eighth Circuit, in addition to that I think there are other distinguishable characteristics, mainly all of the documents underlying the exhibits in those cases are either admitted into evidence or at the very least admissible, regarded as admissible.

Those cases also, as far as I can tell, either explicitly -- where it's explicitly addressed the witness was disclosed during the pretrial phase and not on the eve of closing.

So, Your Honor, I think this fails under 1006 and should not be admitted, and no foundation could be laid even if we were to reach that stage.

Thank you.

THE COURT: Okay. Mr. Nicholson.

MR. NICHOLSON: Two points. As to the foundation for the underlying summary, again -- and counsel didn't disagree with this -- it is a Rule 26 disclosure. It's one of their operative disclosures in the case. It doesn't need a separate fact witness to testify about that. It is an operative disclosure, so there's no need for a separate witness to testify.

If plaintiff has concerns about the summary exhibit, which we think are misplaced, we would gladly move into evidence the entire database that they produced to us as part of their disclosures. This was an effort to make things more efficient and to summarize the content of that for the Court.

As to this issue of ambush, I find that highly ironic because we disclosed this to plaintiff four days -- pursuant to the four-day disclosure. Plaintiff didn't say anything about it, apparently neglected even to look at it.

THE COURT: Well, the four-day disclosure has to do with the identity of exhibits to be used with a witness. That's what the four-day disclosure is. So this document falls outside of that.

MR. NICHOLSON: And, Your Honor, so the only other place you would disclose it would be a witness list, but

there was no requirement to disclose 1006 witnesses on the witness list that I'm aware of. In fact, plaintiff didn't disclose any 1006 witnesses in its witness list and yet they proceeded to produce to us several 1006 documents that they might use to produce summaries.

So clearly the understanding on both sides was that you didn't need to disclose these witnesses in your witness list. If that had been the understanding, plaintiff would have had to identify a witness too.

This was raised with them in the four-day disclosure. They had plenty of time to raise any concern. They apparently neglected to do that. And the failure on their part to raise any issue that they had in a timely matter, shouldn't redound against us and prevent us from being able to call the witness today to testify about what is extremely simple, that she took a spreadsheet and just summed up columns and came up with the basic numbers, the totals by year, and the percentages. There's no possible prejudice for plaintiff to have a witness testify about such basic exercises.

Thank you.

MR. MILLER: Nothing further, Your Honor.

THE COURT: Very good. All right. The Court is prepared to rule.

On the eve of trial the defendants disclosed a

1006 summary, which is a summary of a Rule 26 disclosure that is itself a summary. That exhibit was not tethered to a witness because there was never any intention to have a witness testify about the exhibit. The intention was on the eve of the closing argument for that summary to be used by counsel in the closing argument.

When one looks at the state of the law, there are very few cases, in fact, that address this issue directly. The only case cited by the defense where there was actually an objection raised to the preparation of the summary by a paralegal from the defendant's law firm is the First Circuit case. The other cases, some of them directly say there was no objection raised, but there's no discussion of an objection raised.

So I think it is safe for the Court to say that the First Circuit and the Eighth Circuit disagree about this. But this Court is in the Eighth Circuit and this Court reads the *Grajales-Montoya* case from the Eighth Circuit differently than counsel for the defense does.

Counsel for the defense draws a distinction between a trial team lawyer and a paralegal working for that trial team in preparing this summary at one of the defendant's law firms representing that defendant. I don't see that distinction drawn in any case and I suspect the Eighth Circuit wouldn't find a distinction there.

Now, I agree that the Eighth Circuit case is older. It's 1997. However, it was written by a current member of the Eighth Circuit. And, as counsel for the plaintiffs pointed out, there is a subsequent case from the Northern District of Iowa that specifically addresses this very issue in the Eighth Circuit case and finds that that court is bound by the authority in *Grajales-Montoya*. I similarly am bound by that authority.

So there is one circuit that has disagreed with it. Other courts have permitted it, but not because there's been an objection. It's just been introduced.

And so based on all of those reasons, the Court will not permit this last-minute, eve-of-closing exhibit to be introduced for purposes of closing argument.

All right. Let's move on to any other issues we have on documents or anything else before closing. Mr. Clouser.

MR. CLOUSER: Good morning, Your Honor. Keith Clouser from Williams & Connolly on behalf of PRMI.

I'm pleased to report the parties have met and conferred regarding the admission of certain deal documents and my understanding is we have an agreement that PRMI will submit a subset of deal documents into evidence.

There are 117 of them and so rather than reading them into evidence, we have prepared, with agreement from

plaintiff, I believe, DDX-18, which just lists the deal documents that PRMI seeks to move into evidence.

So we'd like to submit to the Court DDX-18.

THE COURT: And that's DDS?

MR. CLOUSER: X.

THE COURT: DDX-18. And that is a demonstrative, if you will, that contains all of the deal documents that the parties have agreed may be received into evidence and you're comfortable with a record in that fashion?

MR. CLOUSER: Correct, Your Honor.

THE COURT: Okay. And you're asking me to admit into evidence DDX-18, correct?

MR. CLOUSER: And the documents that are identified on that exhibit.

THE COURT: Okay. Any objection to that, Mr. Miller.

MR. MILLER: Your Honor, our understanding is these are deal documents that have been disclosed and at least partly used with their witnesses and so no objection to those being admitted into the record.

THE COURT: Okay. Now, are any of these documents being introduced for a limited purpose, such as the purposes we identified yesterday, or are these being introduced for all purposes?

MR. CLOUSER: I believe these are being introduced

for all purposes, Your Honor.

THE COURT: All right. Well, hearing no objection, DDX-18 and all of the documents identified in that exhibit are received in evidence.

And you're going to hopefully docket that so the Court has a copy of it.

MR. CLOUSER: We will file it on the docket and I have a copy to hand to the Court, if I may.

THE COURT: Thank you. You may approach.

MR. CLOUSER: Thank you, Your Honor.

THE COURT: All right. Mr. Scheck.

MR. SCHECK: Good morning, Your Honor. Matthew Scheck for the plaintiff.

Your Honor may recall yesterday we entered some exhibits into evidence from the bankruptcy and at the end there was a little bit of confusion as to one of the exhibits, DTX-538, which was the reply declaration of Frank Sillman from the 9019 in the bankruptcy.

And I discussed with Mr. Nicholson the confusion there was that when I spoke, I categorized the three declarations together, meaning the two declarations from Mr. Lipps and the declaration from Mr. Sillman, and I focused my argument primarily on Mr. Lipps.

What I said about the Sillman declaration was, I think if I recall, it's sort of the quintessential

information available to the parties because Mr. Kruger testified in deposition testimony as the CRO, who bound the parties to the settlement, that he relied on -- or reviewed the Sillman declaration from the original settlements.

And that was the argument I made, but to be fair to Mr. Nicholson, my argument was focused on Mr. Lipps and I think he did not have an opportunity to respond on Mr. Sillman and so with the Court's permission obviously I wanted to give him the opportunity to respond before that exhibit is admitted.

THE COURT: Okay. Mr. Nicholson. And this is DTX-538?

MR. SCHECK: Yes, Your Honor.

THE COURT: Okay.

MR. NICHOLSON: Thank you, Your Honor, and thank you, Mr. Scheck.

So plaintiff, as I understand it, has sought to admit this reply declaration from Mr. Sillman as information that was available to RFC at the time of the bankruptcy. That could only be relevant to two issues as I see it. One would be the reasonableness of the bankruptcy settlements, which is an issue that's no longer a live issue in this case in light of the Court's summary judgment ruling, and the second way it could be relevant is to allocation.

But plaintiff hasn't articulated any way in which

this Sillman reply declaration bears at all on their position on allocation. I don't know that any of their experts have relied on this at all with respect to allocation, and I'm not aware of any argument that they are making that this is relevant to allocation.

So our concern is that what it's really being used for is not a non-hearsay purpose relating to allocation, but a hearsay purpose relating to causation, that is, we think it's being used for its truth in an effort to show what Mr. Sillman supposedly actually did at the time -- in the course of the bankruptcy.

Plaintiff has to prove in this case causation. It needs to show that its theory that an underwriting guideline violation causes a violation of the pool-wide reps was actually something that caused the claims in the bankruptcy.

But they have a gap in proof because none of the bankruptcy experts ever discussed that kind of theory. They don't even discuss the pool-wide reps at all. So they have offered this highly speculative theory that even though the experts didn't mention the pool-wide reps, they must have been looking at them.

So we think that what this is trying -- that plaintiff is going to try to use this as an effort to bolster that theory to try to show the truth of what Mr. Sillman supposedly did.

We think the document doesn't actually support plaintiff's theory. It instead shows that Mr. Sillman just did an expedited review where he made an assumption where he treated substantial compliance with guidelines as a proxy for breaches of reps and warrants without actually analyzing what the trust-level reps were.

But setting aside our disagreement about the meaning of the document, we don't think it's proper to use this out-of-court statement by Mr. Sillman to show what he actually did.

And to remind the Court, this is the document that Mr. Hawthorne put up on the screen as part of one of his demonstrative slides when he was making this causation argument about what Mr. Sillman supposedly actually did. So I think it's being used for a hearsay purpose.

I would also say that the parties have designated testimony from Mr. Sillman himself from his deposition. That's the testimony they should be relying on. Plaintiff shouldn't be able to put in this out-of-court statement now to show what Mr. Sillman supposedly did.

So we don't think this document should come in at all, but if it does, it should be limited to -- although I don't think it's relevant to this, the information available to RFC at the time of the bankruptcy, it shouldn't be allowed to be used for its truth to bolster any causation

argument.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Scheck.

MR. SCHECK: Very briefly, Your Honor. I don't want to recount the arguments I made yesterday because I do believe they are equally applicable to Mr. Sillman's declaration. I want to just do two things.

First is make clear we are not seeking to offer this into evidence for the truth of the matter asserted. It is for the limited purpose in line with the documents that were entered yesterday, as Mr. Nicholson just described. So that's the first clarification.

The second is that, again, just to kind of briefly revisit yesterday, this becomes a problem with respect to all of the various depositions, briefs, and declarations that we have been talking about. They all have that same danger and we have agreed that the Court may review for the limited purpose and that we may submit to the Court for the limited purpose all of these various things and we can't just start selecting some, because the deposition designations have the same issues, frankly.

And with that, unless Your Honor has questions, I'll take my seat.

THE COURT: All right.

MR. SCHECK: Thank you.

THE COURT: Well, I mean, the good news is that the Court is the fact-finder here and understands that this exhibit is being introduced not for the truth of the matter asserted, but rather limited to evidence, like so many other documents in this case, of what was available to the parties at the time of the mediation.

And so when I do my findings of fact, it will be clear that I'm not relying on this in any way for the truth of the matters asserted; and I presume when the parties submit their findings of fact, it will be clear that it's not being used for that purpose.

And whether the Court views the -- this limited purpose as being relevant to allocation, we'll just have to wait and see how the findings of fact play out.

So as with so many documents that have now been introduced, DTX-538 is received for that limited purpose.

All right. Anything else about documents?

All right. Should we take a minute to talk about the parties' views on when the proposed findings of fact and conclusions of law should be submitted to the Court?

Mr. Nesser.

MR. NESSER: Your Honor, certainly we would defer to the Court's practices on that issue. I think from our perspective, we've had a lot of downtime and the Trust would

be prepared to file its proposed findings of fact and conclusions of law quickly, on an order of, you know, two or three weeks, I would say.

THE COURT: All right. And is it the Trust's view that these should be done simultaneously or there should be an opportunity to review each other's proposed findings and respond?

MR. NESSER: Your Honor, my understanding of what we had seen in prior cases before Your Honor was that they were done simultaneously and so we, I think, just assumed Your Honor would prefer for it to happen that way here as well. If the Court has a different preference, of course we will be happy to discuss it; or if the Court is open to different approaches, we're happy to discuss that, too.

THE COURT: Okay. Thank you, Mr. Nesser.

Mr. Nicholson.

MR. NICHOLSON: Thank you, Your Honor. We haven't formed a final view on that issue of the timing. As to Mr. Nesser's proposal, I think maybe three weeks might seem reasonable. We're happy to meet and confer with them about that or whether maybe more time, but that three weeks seems generally the right ballpark, I think.

With regard to responding to each other's or filing simultaneously, it's my understanding it's normally done simultaneously, but we're happy to meet and confer

about that too and get back to the Court on our view.

THE COURT: Given that, I think we should just set a deadline for three weeks and have simultaneous submissions.

MR. NICHOLSON: Okay.

THE COURT: All right. So whatever three weeks is from today, that will be the deadline for that submission.

Now, it's entirely possible that PRMI, in fact, provided the Court with those additional designations. Did that happen, Mr. Clouser?

MR. CLOUSER: Your Honor, we have not filed the chart yet on the docket. We have to send it to plaintiff. We had to reformat some of the charts for filing and so I need to send that to the plaintiff today for final confirmation that it's consistent with them.

THE COURT: Okay. So you should have no trouble getting that finalized by Monday or Tuesday of next week?

MR. CLOUSER: That's correct, Your Honor.

THE COURT: And I think that should be all that's outstanding. Am I right about that?

MR. CLOUSER: In addition, we will be filing the list that I provided you today with the deal documents. But other than that, I think that's everything.

THE COURT: Okay. Oh, yes. There was a request for a redacted copy of the Court's order earlier this week.

Have the parties had a chance to meet and confer on that question?

Ms. Nelson.

MS. NELSON: We have, and we will be submitting something to the Court.

THE COURT: Okay. Very good. All right. Anything else?

All right. Then we will begin with closings at 1:30. Court is adjourned.

(Lunch recess taken at 11:32 a.m.)

* * * * *

(1:27 p.m.)

IN OPEN COURT

THE COURT: Mr. Johnson, you look ready to go.

MR. JOHNSON: Yes, Your Honor. Thank you.

THE COURT: You may proceed.

MR. JOHNSON: Plaintiff's counsel talked in opening statement about the real world. That real world is nowhere to be found in the case presented by plaintiff at trial. Plaintiff's case concerns loans overwhelmingly sold by PRMI between 2000 and 2005, but the RFC bankruptcy concerned trusts from 1998 to 2007.

Plaintiff ignores the substantial differences between early trusts and those from 2006 and 2007.

Plaintiff asserts a pool wide -- a theory on pool-wide reps that has no connection whatsoever to the real world. Plaintiff ignores the real-world implications of RFC's fraud disclaimer. Plaintiff ignores entirely the real-world defense of the statute of limitations defense available to RFC with respect to 339 of 506 at-issue trusts.

Plaintiff ignores how the PRMI-RFC relationship functioned in the real world when RFC actually was in business, including with respect to Assetwise Direct. And plaintiff asserts that the Court should allow it to make sweeping assumptions on damages because it failed to obtain any real-world data.

If plaintiff had taken the real world into account, we never would have even been here today. It's undisputed that RFC rarely made a standard industry rep that loans -- each loan in a securitization complied with the applicable underwriting guidelines. Indeed, RFC made fewer and very different reps than the reps it received from originators. Faced with the absence of a compliance rep, plaintiff has attempted to create such a loan-level rep out of two pool-wide reps; the credit grade rep and the loan doc rep. The language meaning and how these reps would be breached are very different than a loan-level compliance rep.

So what actual evidence did plaintiff bring to

bear on the issue? Little to none. Plaintiff presented Ms. Farley's view that when she was at RFC in the 1990s, she thought these reps could be breached by a single loan; and Ms. Farley wasn't even at the company when it started making the pool-wide credit grade rep and she didn't identify any contemporaneous documents supporting her view. And she had to concede that as to both -- as to both pool-wide reps, the percentages RFC were permitted -- the percentages provided by RFC were permitted to move by more than a single loan.

First, as to the pool-wide loan documentation rep, in the example that she used on direct, the characteristics of the pool were substantially representative and may vary, and Ms. Farley agreed that the percentages could change somewhat.

Also as to the pool-wide credit grade rep in the example that she used on direct, the characteristics in the pool could change up to 5 percent, and Ms. Farley agreed that that was the case. And despite conceding these variances, Ms. Farley still contended that in the $2 billion deal with almost 20,000 loans that she testified about on direct, a single loan could breach the pool-wide credit grade rep. Now, that, quite simply, is not credible testimony.

Mr. Butler was plaintiff's re-underwriter. Mr. Butler's only experience with trust-level reps is from

being hired by plaintiff's lawyers demanding repurchase of loans. In those 12 years of litigation he saw compliance rep in virtually every single case, but in all of the 30 plus years of consulting, Mr. Butler had no experience with the pool-wide loan doc or credit grade reps. He went so far as to say that the percentages listed in the credit grade rep were not relevant to him, raising the question of how he possibly could determine that there was a breach of such a rep.

Nor could Mr. Butler identify any meaningful repurchase history as to these pool-wide reps. Of the nearly 10,000 loans in the RFC's investor repurchase database, Mr. Butler could not identify a single demand based on the pool-wide loan doc program rep.

And he mentioned one repurchase demand on one loan based on the pool-wide credit grade rep, and even on that loan the repurchase history refers to the Prospectus Supplement, not to the credit grade rep. It's not surprising that in the real world there was no repurchase history based on RFC's pool-wide reps. Industry participants did not understand the pool-wide reps to be loan-level reps, much less that those reps effectively were a compliance rep.

The lack of any repurchase demands also lays bear plaintiff's assertion that these pool-wide reps must have

been loan-level compliance reps because they're in a section of a deal document discussing the repurchase protocol. As PRMI's experts testified, the placement of a rep in the deal documents does not transform what clearly is a pool-wide rep into a loan-level rep. No industry participant would have understood it that way, and clearly none did based on the lack of any repurchase history. At most, the placement creates a question of how a remedy would be fashioned if it were established that there were material breach of one of the pool-wide characteristics in the reps.

Nor does plaintiff's argument establish that these are equivalent to a compliance rep. So plaintiff can't sustain its burden to prove causation on this evidence. And in turning to the bankruptcy, the evidence got no better for plaintiff. Now, we don't know how the bankruptcy settlements ultimately were reached because they're covered by mediation privilege, but we do know that the bankruptcy parties never discussed the pool-wide reps at all in their many motions, objections, and replies. The only oblique reference that plaintiff could find in the bankruptcy is to a generalized list of reps in the background section of a proof of claim describing various types of things that the reps pertained to.

The reference actually disproves plaintiff's assertion, which is likely why it was only mentioned once

during the entire trial on re-redirect. While the proof of claim refers to each mortgage loan in describing the compliance rep and other reps regarding the various characteristics of each specific mortgage loan, when it discusses owner occupancy and documentation-type reps, it refers to percentages of a mortgage pool.

This clear distinction between loan-level and pool-wide reps is directly counter to plaintiff's efforts here to transform these pool-wide reps into ones under which loan-level repurchase claims could be asserted.

Now, plaintiff blames the lack of cases interpreting these pool-wide reps as loan-level reps on the purported uniqueness of RFC's reps. But even if that were the case, it doesn't somehow turn these loan-level reps -- turn these pool-wide reps into loan-level reps. Plaintiff hasn't pointed to any cases holding that pool-wide reps are, in fact, loan-level reps; and neither does it explain how RFC received virtually no repurchase demands out of nearly 10,000 in the RFC repurchase -- investor repurchase database that even mentions either pool-wide rep. And it doesn't explain why it never came up in the many issues debated in the bankruptcy that these purportedly unique pool-wide reps actually were loan-level reps.

So plaintiff turned to Mr. Hawthorne. Now, he included only one paragraph on the pool-wide credit grade

rep and two paragraphs on the pool-wide loan doc rep in his 500-paragraph expert report. And apart from cases brought by this plaintiff, he is not aware of any other case in which loan-level breaches of these pool-wide reps have been alleged.

But Mr. Hawthorne did point to a number of other RFC reps that could have subjected RFC to substantial liability. And what does plaintiff -- and what plaintiff does in the absence of any actual evidence from the bankruptcy about consideration of the pool-wide reps is to point to mere shreds and have Mr. Hawthorne speculate as to evidence that's not there. Contrary to Mr. Hawthorne's assertions, the unsecured creditors committee re-underwriter, Mr. Morrow, did not look at RFC's reps at all to the trusts.

Debtors' re-underwriter, Mr. Sillman, didn't re-underwrite to RFC's reps either. He made an assumption based on the few trusts he had time to look at that all trusts had a compliance rep. And there's no evidence that the re-underwriter for the plaintiff's side trustees, Duff & Phelps, even identified or mentioned, much less applied, the pool-wide reps in its re-underwriting.

Plaintiff could have deposed these re-underwriters and asked them whether they, notwithstanding all of the evidence to the contrary, actually applied the pool-wide

reps in their re-underwriting, and whether they considered those reps to be the equivalent of a compliance rep, but they never did. Maybe because they didn't want the answer.

Now, step back and think for a moment about how plaintiff is attempting to prove its case on causation with respect to the pool-wide reps. Plaintiff designates snippets of deposition testimony from Morrow, Cornell, Sillman and Pfeiffer, puts it up on a slide, but they say nothing about the pool-wide reps. Instead, plaintiff had Mr. Hawthorne come in and speculate on their state of mind that they must have been referring to the pool-wide reps when they talked in their reports about the compliance rep despite that no words ever came out of their mouths or flowed from their pens. To say that's an odd way to try to carry a burden would be an understatement.

So that leaves plaintiffs with attempting to premise its entire causation case on the idea that the pool-wide reps presented some amorphous increased risk of liability to RFC. But that's not sufficient. To satisfy its causation burden, plaintiff must do more than allege an increased risk in the air. Rather, it must show that these representations actually were a source of RFC's purported bankruptcy liabilities, and they've come nowhere close to satisfying that most basic standard. There's no such evidence to speak of.

Unlike plaintiff, PRMI presented expert testimony from actual industry experts regarding these pool-wide reps. Mr. Burnaman testified from the perspective of an RMBS investor. He said that where sponsors made an underwriting rep, it took the form of RFC's compliance rep. RFC provided such a rep infrequently and could do so because investors had a comfort level with a sponsor like RFC who had a long track record of performance. In light of all of Mr. Burnaman's industry experience, he was not aware of any instance where repurchase demands on individual loans were made based on pool-wide reps.

And even if one were to conceive of doing so, the deal documents were clear that the percentages in these pool-wide reps were subject to change. The pool-wide reps were not warranting the type of precision that plaintiff's experts are claiming in this case.

Professor Schwarcz testified from the perspective of someone who put these transactions together. He testified that no reasonable industry participant would have viewed the pool-wide credit grade rep as a loan-level rep warranting compliance with underwriting criteria, and he testified similarly with respect to the pool-wide credit grade rep. Professor Schwarcz, in all of his experience, had never even heard of anyone taking the position that such pool-wide reps actually were loan-level reps or that these

reps concerned guideline compliance.

Ms. Keith likewise testified that these reps are very different from a loan-level compliance rep and that she had never even seen a party seek repurchase of individual loans based on alleged allegations of a pool-wide rep.

The testimony of PRMI's industry experts is consistent with the factual record. There's a dearth of evidence concerning the nearly 10,000 pre-bankruptcy repurchase demands based on pool-wide reps, and the bankruptcy debtors never pointed to the pool-wide reps as a potential source of liability. The re-underwriters in bankruptcy never alleged any breach of these pool-wide reps, and objections were made on the basis that most trusts did not have a compliance rep, including by MBIA at approximately 80 percent of the original trust settlement -- original trusts in the original settlement did not receive protection through representations and warranties concerning the underwriting standards.

Plaintiff refers to the real world to say that it would be too difficult and complex to allege and prove a breach of the pool-wide reps if those reps could not be breached by a single loan. But whether the issue is one of complexity or simply that no one ever viewed these pool-wide reps as loan-level reps, much less the equivalent of a compliance rep, or some combination of those things, the

inescapable fact is that such reps were not the basis for liability to RFC, either before or during the bankruptcy. The overwhelming evidence shows that plaintiff has not come close to satisfying its burden on causation with respect to these pool-wide reps.

Now, there's no dispute in the case that RFC seldom provided a no-fraud rep. As Professor Schwarcz testified, RFC only starting providing this no-fraud rep in 2006 in later deals. And as Mr. Burnaman testified, this no-fraud rep provided in those later deals by RFC took the form of a standard no-fraud rep in the industry. If the borrower lied, the sponsor covered it.

So was fraud in the origination something that sponsors and investors just ignored prior to the inclusion of a no-fraud rep? No. It was dealt with through other mechanisms, as PRMI's experts explained. Mr. Burnaman discussed several ways that the industry accounted for potential borrower fraud in securitization deals. One way was through over-collateralization to cover credit losses, including those due to borrower fraud.

Another way was for the sponsor to create a special fraud reserve that allowed increases in proceeds while setting aside cash dedicated specifically to covering losses related to borrower fraud.

And another way was providing -- by providing a

no-fraud rep under which case the over-collateralization would be less and the proceeds in the deal would increase, but there would be recourse against the seller for borrower fraud. As Mr. Burnaman explained, this over-collateralization structure, the fraud reserve, and later the no-fraud rep would have made no sense if fraud had always been covered by the no default and MLS reps.

Professor Schwarcz testified about sponsor's pass-through reps made by originators to trusts and investors. This provided recourse with respect to borrower fraud. And Ms. Farley testified that this was the very purpose of including such a pass-through provision in its deals.

Ms. Keith testified about how a no-fraud rep is a subject of heavy negotiation between the parties, and the price of the deal can be impacted by the negotiation.

Although parties and courts in the throes of litigation may forget this, reps and warrants are not the only way that parties to an RMBS transaction allocate risk. The testimony from PRMI's experts illustrates various ways this can occur with respect to borrower fraud and misrepresentation. PRMI's experts testified that the no default and MLS reps serve very different functions compared to a no-fraud rep, and industry did not understand these reps to cover borrower fraud.

The MLS and no-default reps had been provided in securitizations from essentially the beginning. The no-default rep was generally understood in the industry primarily to cover payment default, not as a substitute for a no-fraud rep. And the MLS rep was understood to warrant the information in the Mortgage Loan Schedule had properly been entered.

And as Ms. Keith reminded us, there was a time when the Mortgage Loan Schedule was not populated automatically. It had to be hand entered into a spreadsheet. So the idea that the MLS had to accurately reflect the information for the loan mattered. In 2020 or in 2000 -- even in 2013, it might seem strange to have such a rep about transcription. But when you think about the relative lack of technology at the time this rep came into existence, it makes sense.

But beyond those facts, RFC expressly disclaimed plaintiff's MLS and no default interpretations. RFC made this fraud disclaimer in the large majority of its pre-2006 trusts while excluding it from the large majority of its post-2006 trusts.

RFC disclaimed that it was taking on the risk through its reps of allegations based on other representations. It was, as we saw RFC call it, exculpatory language. Professor Schwarcz testified that it would make

no sense to accept a convoluted interpretation that another rep was the equivalent of a no-fraud rep while disregarding the fraud disclaimer. And plaintiff's experts were not aware of a single case where it was asserted, much less held, that borrower fraud and misrepresentation breach the MLS and no-default reps where there was an express fraud disclaimer. Mr. Hawthorne had never seen one; and while Mr. Butler, contrary to his deposition testimony, thought he had been in such a case, he couldn't identify any fraud disclaimer when shown the reps for the trust at issue in that case. The only thing plaintiff's witnesses could say is that RFC's fraud disclaimer does not apply because Mr. Butler only alleged misrepresentations.

But this distinction does not stand up under scrutiny and certainly does not pass plaintiff's purported real-world test. PRMI's experts all explained that industry participants did not draw the fine line that Mr. Butler asserts.

Mr. Butler -- or Mr. Burnaman testified that industry participants did not distinguish between types of untrue statements. Professor Schwarcz testified that incorrect statements by a borrower were disavowed by RFC through the fraud disclaimer; and Ms. Keith testified that in the mortgage industry the terms are used interchangeably. This was particularly true with respect to the types of

blatant misrepresentations alleged by Mr. Butler and other RMBS plaintiffs.

Nor has plaintiff pointed to any contemporaneous document drawing the distinction that plaintiff attempts to draw in this case either prior to RFC's bankruptcy or during the bankruptcy itself.

Indeed, we know that RFC took this position in the bankruptcy. After Mr. Butler discussed the testimony of RFC's in-house lawyer expert on securitization, John Ruckdaschel on direct examination, he was asked on cross about another part of Mr. Ruckdaschel's testimony in his bankruptcy deposition where he discussed the fraud disclaimer. And he said, "If the substance of the repurchase claim sounds in fraud or a misrepresentation on the borrower's part, if it has exculpatory language, it's specifically disavowing it with respect to the servicer or, said another way, fraud risk has been transferred. Fraud or," and he corrected himself and said, "Fraud or misrepresentation risk has been transferred into the related securitization."

Now, Mr. Butler said that Mr. Ruckdaschel was mistaken, apparently not only knowing Mr. Ruckdaschel's mind better than Mr. Ruckdaschel himself, but also knowing RFC's position in the bankruptcy better than its in-house expert on securitization. But even Mr. Butler acknowledged that

there is some mix and match to his mind between fraud and misrepresentation.

So plaintiff has not shown that the no default and MLS reps are the equivalent of a no-fraud rep and such an interpretation was expressly disclaimed in trusts where RFC included a fraud disclaimer. In such circumstances, plaintiff has not demonstrated that allegedly breaching PRMI loans caused RFC to breach the MLS or no-default rep.

But separate and apart from the issue of causation, the evidence clearly has established that claims based on borrower fraud and misrepresentation are much stronger on trusts that included an actual no-fraud rep than they were on trusts that lacked such a rep. And that disparity in the strength of claims is magnified on trusts where RFC included a fraud disclaimer.

Now, the first threshold issue is whether claims on trusts with a no-fraud rep were stronger than claims lacking such a rep, and the answer to that question is clearly yes. The no-fraud rep is explicit while plaintiff's position on the no default and MLS reps is based on implication.

Unlike the no-fraud rep, industry participants opposed the argument that plaintiffs began to advance in the throes of the financial crisis on the no default and MLS reps. And there was a paucity of case law as of the

bankruptcy settlement period addressing plaintiff's arguments concerning the no default and MLS reps. And on this point, Mr. Hawthorne and Mr. Woll basically agree. Indeed, so undeveloped was the law that Mr. Hawthorne cited statements from discovery hearings as to both reps.

So it cannot be said that as of the settlement period claims of fraud and misrepresentation concerning trusts lacking a no-fraud rep were as strong as such claims concerning trusts that had a no-fraud rep.

Now, the second issue is that this disparity in strength of claims was exacerbated as to trusts where RFC made a fraud disclaimer. RFC added the fraud disclaimer in the mid 1990s because GMAC's legal group had concerns about borrower fraud, and the goal was to prevent as much potential liability to RFC as possible.

All of this was expressly disclosed to investors in the Prospectus Supplement to avoid any confusion. In that disclosure RFC did not say that it thought the fraud disclaimer would be ineffective or that it would still be liable under other reps it had made. Rather, it stated in no uncertain terms that it was not liability for borrower fraud. As Ms. Farley said when asked why RFC didn't say that in its disclosure, she said, Why would we given that RFC thought it had an argument?

So the history of the fraud disclaimer, the fraud

pass-through, and the no-fraud rep shows that RFC took conscious and well-thought-out steps to minimize its potential liability as long as it could do so; and to suggest, as plaintiff does now, that all those steps were meaningless defies belief. It surely ignores the real world.

But plaintiff failed to ascribe any difference in strength of claims to trusts where RFC included a fraud disclaimer. And while, as one might expect, plaintiff's witnesses all attempted to minimize the importance of the fraud disclaimer, they all agreed that the fraud disclaimer provided RFC with an argument. Ms. Farley testified that RFC included the fraud disclaimer to minimize its risk and she agreed that having an argument was better than not having one. Mr. Butler testified similarly. And Mr. Hawthorne also agreed that the fraud disclaimer gave RFC an argument.

Now, neither Ms. Farley nor any of plaintiff's experts could identify any RFC documents stating or suggesting that the fraud disclaimer would be ineffective, and plaintiff did not establish that that was the case through RFC's own historical practices.

Mr. Butler relied on RFC's investor repurchase database to support his opinions. But he pointed to only a single loan out of nearly 10,000 loans in that database

which he contends was repurchased based on an allegation of fraud or misrepresentation in a deal with a fraud disclaimer. And he was confronted on cross with evidence that RFC denied repurchase for fraud and misrepresentation on more than 80 loans based on the presence of a fraud disclaimer. That's a 1 to greater than 80 ratio.

In light of Mr. Butler's reliance on RFC's investor repurchase database, is there any doubt that plaintiff would have elicited testimony about how ineffective the fraud disclaimer was if substantially more loans could be identified than the single instance about which Mr. Butler testified? And if that were the case, plaintiffs certainly would have presented that evidence.

And if there's any doubt that -- and is there any doubt that if such repurchase demands involving the fraud disclaimer were made or agreed to anywhere near as often as they were in the far fewer trusts where RFC made an actual no-fraud rep, that plaintiff would have elicited that evidence in support of its position on the relative strength of claims? Of course it would have.

Mr. Hawthorne tried to minimize the importance of the fraud disclaimer based on the purported distinction between repurchase claims based on misrepresentation and those based on fraud. Of course, Mr. Hawthorne pointed to no statements by RFC that it made such a distinction.

But if RFC actually had done so, it would have been easy to establish that fact through the investor repurchase database, but Mr. Hawthorne never did that. Instead, his opinion on the fraud disclaimer in his expert report was limited to a single footnote. And Mr. Butler acknowledged instances where RFC denied repurchase claims alleging misrepresentation based on the presence of a fraud disclaimer.

Now, like Mr. Hawthorne, PRMI's expert David Woll was not aware of any court decisions addressing whether the no default or MLS reps cover borrower fraud and misrepresentation in a deal that included a fraud disclaimer. But Mr. Woll disagreed that RFC would be limited in any significant way by plaintiff trying to cast its allegations as one of misrepresentation rather than fraud. And Mr. Woll testified that the defense arguments would be much stronger where a fraud disclaimer was made compared to a no-fraud rep.

In addition to making real-world sense, that opinion is consistent with the evidence from this trial. In the real world, RMBS litigants were aware of how the strength of claims and defenses differed between trusts.

Now, under the applicable law, it's plaintiff's burden to prove how a reasonable defendant in RFC's position would have assessed the relative strength of claims asserted

against it. And in addition to ignoring the fraud disclaimer, plaintiff assigns no value to RFC's statute of limitations defense, and that's simply not credible.

And there's no real-world dispute -- there's no real dispute that the statute of limitations was a colorable defense as to claims asserted against many of the trusts at issue in the bankruptcy.

It's undisputed that the statute of limitations was raised by RFC in the bankruptcy. Ms. Hamzehpour, ResCap's general counsel, testified that the statute of limitations would have been asserted in litigation; and Mr. Kruger, the chief restructuring officer for the debtors, was aware of the statute of limitations issue. RFC raised the statute of limitations defense to exclude pre-2004 trusts from the original settlement, and the bankruptcy parties objected that the allowed claim amount of the original settlement was too high based on the statute of limitations.

The Unsecured Creditors Committee argued that the statute of limitations applied to 2004, 2005, and some 2006 loans and trusts in the original settlement. And MBIA argued that the failure to consider the statute of limitations defenses to those trusts was problematic.

And while we don't know what it actually happened in the negotiations that led to the RMBS settlement in May

2013 when 155 pre-2004 RFC trusts and hundreds of others were added to the trusts in the original settlement, the parties actually -- when that did occur, the parties actually negotiated a lower allowed claim settlement amount. The only reasonable inference is that RFC did take into account the statute of limitations in negotiating that settlement. The pre-2004 trusts were an afterthought.

Against all of this, plaintiff relies on Mr. Hawthorne. The opinions disclosed in Mr. Hawthorne's report concerned evaluations of the reasonableness of the settlements, not allocation. In the hundreds of paragraphs in his report he never even cited the relevant standard for analyzing allocation among indemnitors who are not parties to the underlying settlements, and he never even referred to the cases laying out that standard in his materials relied on, which included many, many cases.

Even if one considers the undisclosed opinions Mr. Hawthorne volunteered at trial, those opinions do not satisfy plaintiff's burden. Contrary to his report, Mr. Hawthorne said at trial that he thought plaintiffs had the better of the statute of limitations argument at the time of the settlements.

But even if Mr. Hawthorne's view was deemed to be that of a reasonable defendant at the time, notwithstanding all of the evidence to the contrary, that would not satisfy

plaintiff's burden. As Mr. Woll explained, even if that view were correct, a reasonable defendant still would take the statute of limitations into account in settling claims.

Both Mr. Hawthorne and Mr. Woll discuss the increase in RMBS repurchase case filings in 2011 on trusts that closed in 2005 and 2012 pertaining to 2006 trusts. Mr. Woll provided a detailed and thorough explanation for his opinions and the bases for them. He testified that the basic principles of New York law that had been established as of the settlement period favored defendant's position on the statute of limitations.

Mr. Woll discussed the cases that were relied on by plaintiffs and defendants, what those cases considered and did not consider, and why they were relied on. The federal court cases defendants relied on considered the statute of limitations in RMBS cases under New York law. The only case relied on by plaintiffs that even considered the statute of limitations under New York law failed to even cite New York authority, and the weakness of that case was specifically discussed in the bankruptcy.

And Mr. Woll explained that ultimately the New York appellate courts unanimously adopted the defendant's position. And the issue is not just how the *ACE* appellate decisions came out. It was how they got to their results by relying on longstanding principles of New York law to reject

the plaintiff's novel theory. The very principles relied on were those that would be predictive for a reasonable defendant to weigh how the issue likely would be resolved.

Now, every chance he could, Mr. Hawthorne interjected comments on failure to notify and equitable estoppel theories. But he had to admit that failure to notify, which would require claims against RFC as a master servicer, never was even raised.

Equitable tolling, as a general matter, is only available in exceptional circumstances. The theory has never been successfully raised in an RMBS case to this very day, and there were not any exceptional circumstances in the RFC bankruptcy given that the certificate holders and trustees could discover and assert breaches themselves.

Mr. Woll explained that the theories -- that these theories would not have diminished the statute of limitations defense from the perspective of any reasonable defendant. Mr. Woll opined that a reasonable defendant definitely would have ascribed a lower settlement value to claims subject to the statute of limitations even if it were a 50/50 proposition. But Mr. Woll's opinion was that it was not a 50/50 proposition, and the defendant's position had a significantly better chance of ultimately prevailing than the plaintiff's position did.

This defense, as Mr. Woll testified, applied to

339 of the 506 at-issue trusts. Plaintiff raised several collateral issues that had nothing to do with the statute of limitations in an attempt to rationalize its decision to ignore the defense entirely.

Mr. Hawthorne claimed that it was a sign of uncertainty that Duff & Phelps, on behalf of the plaintiff's side trustees, didn't distinguish based on the statute of limitations defense when dividing up the allowed claims amongst themselves.

Now, there's zero evidence that Duff & Phelps even analyzed the statute of limitations defense, much less how it viewed the defense. There's zero evidence that RFC played any role in the trustee's allocation of those allowed claims as Mr. Kruger testified. And we know, in fact, that the vice president of one of the trustees specifically referred to how the statute of limitations could have barred claims as to certain trusts. Duff & Phelps' exercise on plaintiff of plaintiff's side trustees does not reflect how a reasonable defendant in RFC's position would have viewed the defense.

Mr. Hawthorne did not do anything to investigate the cross-motivation of plaintiff's side trustees in institutional investors. He doesn't know why trustees who got full releases in the bankruptcy did what they did; but in any event, it's irrelevant under the law. What is

relevant is what a reasonable defendant would have done.

Mr. Hawthorne also cited the bankruptcy court's confirmation of how plaintiffs divvied up the allowed claims as a rejection of the statute of limitations defense. Now, that truly is grasping at straws. He pointed to zero evidence, and there isn't any, that the statute of limitations defense even was considered by the bankruptcy court. There was no reason for the bankruptcy court to do so. No one was objecting at that point. It was a consensual settlement.

The Confirmation Order hardly was an articulation of Judge Glenn's views. As Mr. Woll noted, when he finally considered the issue, he adopted defendant's position on the issue prior to *ACE III*.

And Mr. Hawthorne tried to rely on plaintiff's side allocations in other mass settlements as somehow reflective of the state of law. That's obviously not the case. Now, whether we're talking about ResCap or other mass settlements, they involved the same lawyers from many of the same institutional investors and many of the same trustees, including HSBC Bank U.S.A., which is on the plaintiff's side of *ACE*.

Mr. Hawthorne admitted that the *Countrywide* settlement, which included 2004 to 2007 trusts and occurred prior to ResCap, did not have any statute of limitations

issue to speak of. And as we saw, the experts in *J.P. Morgan* and the *Citi* settlements, which included 2005 to 2007 trusts, specifically addressed the issue that the widespread holdings of the Gibbs & Bruns investor groups provided an incentive to ignore the differences between trusts, including which of those were subject to the statute of limitations defense.

It's obvious that what these plaintiffs did in dividing up settlement proceeds amongst themselves had nothing to do with the law. They did what they did regardless of the state of the law. And of course courts give more deference when approving an uncontested settlement to how consenting plaintiffs voluntarily divide up things amongst themselves.

That the *J.P. Morgan*, *Citi*, and *WaMu* settlements all were post *ACE II*, and for the latter two post *ACE III*, proves the point. As Mr. Wall testified, that these settlements and their approvals cannot be viewed as any indication of the strength of the statute of limitations defense. But none of this is of any relevance to this case, which is about allocating settlements among nonindustry -- or nonparticipating indemnitors.

And finally, Mr. Hawthorne says that because Mr. Sillman didn't treat the trusts differently, that must indicate something about the statute of limitations defense,

but it was clear that Mr. Hawthorne was wrong. He said he thought Mr. Sillman did consider the strength of claims, but then Mr. Hawthorne had to admit that Mr. Sillman didn't do so, and of course he didn't. He couldn't. Mr. Sillman is a nonlawyer. His so-called litigation discount for evaluating reasonableness was based on only three things: debtor's repurchase experience, industry repurchase data, and his own experience with repurchase demands. He never even analyzed the statute of limitations.

Rather than rely on case law to evaluate the strength of claims, plaintiff relied on a nonlawyer in bankruptcy who never even considered the defense. And we know that RFC itself actually did consider the statute of limitations in the bankruptcy.

So having failed to account whatsoever for these issues, plaintiff, through Mr. Hawthorne, asserted essentially that there are too many defenses to do so; but the statute of limitations defense is the only defense discussed in his report where he does not characterize the plaintiff's position as stronger than the defendant's position. He said that the law was clear as to put-back causation defenses that a defect caused a loan to default that such defenses were unlikely to be successful, and that election of remedies was not a strong defense or one in which a defendant in RFC's position could place any

reliance.

The statute of limitations is different. It's a complete defense. Its application is binary. It had the most support in case law and legal precedence. And even if a reasonable defendant would have taken into account some of the other defenses that were available, it just shows that plaintiff's approach is even more flawed. It's a problem with plaintiff's approach, not some redeeming aspect of it.

That there may be more than one possible defense does not mean that you just ignore the strongest defenses. Were all of these defenses accounted for, they all likely would have helped PRMI given that PRMI's loans were disproportionately concentrate in earlier trusts. So by focusing on the statute of limitations defense, PRMI was being conservative.

Mr. Hawthorne also said that it was not appropriate to quantify any defenses in any way, that he couldn't put a number on anything. The implication of Mr. Hawthorne's testimony is that an indemnity can ignore the strength of claims by identifying minor arguments and conflating them with essential issues. That's not the law. On *UnitedHealth* it's inherent that a plaintiff must value the strength of claims on the underlying claims and defenses.

And by the way, Mr. Hawthorne had no problem

putting a dollar value on servicing claims, including no value whatsoever for monoline servicing claims when it had the effect of increasing plaintiff's damages. Plaintiff's allocation methodology assigns no value to servicing -- assigns values to servicing claims and claims regarding the NDS trusts, and it assigns dollar value to the alleged breach claims for which it contends PRMI is responsible.

So clearly, plaintiff can value claims. Indeed, Mr. Hawthorne was asked to consider a 2002 trust that was subject to the statute of limitations defense and had a fraud disclaimer, and to contrast it with a 2007 deal with no statute of limitations issue that had a no-fraud rep. Mr. Woll testified that the defense as to the 2002 trusts were a great deal stronger than the 2007 trust, and that there was a dramatic difference between them. Mr. Woll didn't have to make any great leaps to render that testimony. We all know that what he said is undeniably true.

Now, in order to recover as to a particular loan, plaintiff must establish first that Mr. Butler's allegation that PRMI materially breached a rep to RFC at the loan level is correct; and second, if so, that Mr. Butler correctly asserts that such an origination-level breach caused RFC to materially breach a corresponding rep to the trusts that resulted in a bankruptcy liability.

As to the loans PRMI sold to RFC some 20 years ago under the AlterNet Seller Guide, the evidence showed that Mr. Butler's allegation of material breach were not, in fact, correct. Mr. Butler alleged in his expert report that these loans breached the RFC Client Guide. He only asserted whether the loan breached the AlterNet Seller Guide as part of a truncated alternative analysis included for the first time in his supplemental report; and at trial he essentially transformed his alternative allegations into his primary ones.

As Ms. Keith explained, there are two main problems with Mr. Butler's allegations, even though the allegations in his supplemental report. First, the fact that he uses a guide for more than three years prior; and second, that a number of his breach allegations are factually baseless even under the 1997 guide.

Now, Mr. Butler could not recall ever previously using such a guide. He agreed it was something you wouldn't want to do, and Ms. Keith similarly could not recall any such instance. Mr. Butler agreed that there certainly was a question as to whether the guide was the correct one. He acknowledged that the RFC Client Guide was updated several times a year during this period.

And so we know one just can't assume that the guides match up. For instance, the 2001 Client Guide

contains a no-fraud rep as to both first and second lien loans. But the July 1997 AlterNet Seller Guide only contains that rep as to second lien loans. In light of all of this, Mr. Butler's only retort was that he was not given a more recent guide to use. Now, that's on plaintiff for a number of reasons, but it's not a valid excuse.

Many of Mr. Butler's breach allegations are completely baseless, even under the 1997 AlterNet Seller Guide as a couple of examples show. Mr. Butler made allegations such as he did on loan 4115211 that PRMI was responsible for RFC's decision to upgrade the loan to permit a higher LTV. Now, that makes no sense. And in any event, Ms. Keith demonstrated that the loan was properly upgraded based even on the 1997 AlterNet Seller Guide.

And Mr. Butler made allegations such as he did on loan 4550405 that the property was flipped without any actual evidence of a prior sale, much less the purchase price of such a sale. And even if it were such a transaction, Ms. Keith explained how Mr. Butler mischaracterized the AlterNet Seller Guide provision he relies on and failed to establish any breach of it.

Now, after years of resisting the obvious fact that Assetwise Direct provided PRMI a full credit underwrite to RFC's program terms and criteria, even plaintiff's witnesses didn't really fight this at trial.

Ms. Bangerter was the RFC sales director to PRMI from August or so of 2001 through May of 2005. Now, this was after PRMI signed its second client contract which incorporated the RFC Client Guide after the AlterNet Seller Guide and after PRMI's implementation of Assetwise Direct. She testified that the rules in Assetwise Direct were based on the Client Guide, and that using the system would help PRMI not make violations to the Client Guide.

Assetwise Direct provided a full credit underwrite to RFC's credit underwriting criteria. It could upgrade loans to, for instance, be approved at an 85 LTV when the standard loan programs allowed a 75 LTV; and it took into account compensating factors.

And she agreed that a client like PRMI couldn't represent that the program terms and criteria for credit underwriting in the published Client Guide were satisfied when RFC's automated system was applying the credit terms and criteria. We walked through agreements signed by Ms. Bangerter that required PRMI to use Assetwise Direct. RFC never removed PRMI's access to Assetwise Direct as it could under the Assetwise Direct criteria agreement, and it never revoked PRMI's license to use Assetwise Direct under its accompanying software license agreement.

Now, Ms. Butler -- or Ms. Bangerter, excuse me, was asked on redirect examination by plaintiff's counsel

what RFC would do if it felt that a loan was not prudently originated despite having a valid Assetwise approval, and Ms. Bangerter testified that RFC would return the loan to the seller. But of the nearly 2,400 loans PRMI sold to RFC during the course of their relationship, plaintiff hasn't identified a single instance where RFC returned a loan to PRMI on that basis. If such an instance existed, I'm sure we would have seen it.

Leigh Ann Richardson, the person at RFC who helped PRMI implement Assetwise Direct and sign the agreements with PRMI concerning its responsibilities when using the system, testified similarly; that Assetwise Direct pulled the credit report for the borrower. She agreed that PRMI couldn't represent and warrant that RFC's credit decisions based on Assetwise Direct were correct, nor would that make any sense.

Ms. Maki was RFC's lead underwriter assigned to the PRMI account. She testified consistent with other witnesses as to what Assetwise Direct approval meant for PRMI. Ms. Maki testified that Assetwise Direct would go beyond the punished criteria. Ms. Maki agreed with the statements provided to her by RFC regarding Assetwise approvals, and approval is valid even though certain loan parameters outlined in the Client Guide are not met. It reduces the need to apply each and every credit policy and

parameter stated in the guide; and that validation of an Assetwise Findings Report equated to compliance with the Client Guide.

Mr. Zitting's testimony concerning how Assetwise Direct functioned actually was very consistent with what RFC's witnesses said. That Assetwise Direct ensured compliance with RFC's credit underwriting terms and criteria was what the system did. Mr. Zitting testified how Assetwise Direct was used from the point of sale through the sale of the loan to RFC, just as RFC encouraged, expected, and effectively required PRMI to do.

He discussed agreements throughout the course of the parties' relationship that included RFC products not even offered in the Client Guide and for which PRMI was required, both as a practical and contractual matter, to use Assetwise Direct; and how that functionality meant that PRMI had to run its entire RFC-dedicated production through the system.

RFC never told PRMI that it could not rely on Assetwise Direct approval certificates to comply with RFC's program terms and criteria for credit underwriting, and to do so would have negated the whole purpose of the system.

And Mr. Zitting talked about his many meetings with RFC, including many specific meetings where RFC reiterated its expectations for PRMI's use of Assetwise

Direct.

Now, the testimony of other PRMI witnesses was consistent with what Mr. Zitting said. Ms. Flitton, PRMI's head of its wholesale division, testified that the number one benefit of using Assetwise Direct was giving PRMI confidence that its loans -- that its loans met RFC's criteria. That PRMI relied on the Assetwise Direct certificates provided by RFC.

Mr. Crawford confirmed that the $300 a month access fee, which was called for in the Assetwise Direct Criteria Agreement, was invoiced and paid consistently over the years.

Kathy Meadows testified that PRMI underwriters relied on Assetwise Direct approval certificates provided by RFC to show that PRMI met the conditions that were specified; and if they did, the approval was valid.

And even PRMI pool coordinator in 2001 and 2002, A.J. Swope, testified that Assetwise Direct had all of RFC's eligibility requirements and a bunch of algorithms to take into account credit, income, all the loan details, and return back whether this loan met RFC's criteria.

The evidence is clear that RFC encouraged, acknowledged -- that RFC encouraged, directed, and even required PRMI to use Assetwise Direct; that PRMI relied on those communications from RFC and the Assetwise Direct

approval certificates that RFC provided; and that PRMI did so to its detriment because of the allegations made by Mr. Butler 15 to 20 years after the fact.

Mr. Butler now basically concedes the importance of Assetwise Direct approval certificates after ignoring them in his expert report and later only acknowledging Assetwise Direct at all in his supplemental alternative findings.

With respect to those allegations, and the new ones he made from the stand, Mr. Butler demonstrated a striking lack of understanding of the basics of how Assetwise Direct worked. Perhaps that's because he never personally used an automated system.

Mr. Butler made allegations, such as he did on loan 4113350, that even though Assetwise Direct made an upgrade based on the credit score that it pulled that allowed an 85 LTV instead of a 75 LTV, somehow PRMI's underwriter should have looked at the Assetwise and recognized the wrong score. Now, that frankly is absurd. PRMI had to use the score that the system pulled, as Ms. Keith explained.

Another example is loan 6231616. There, Mr. Butler alleges a lack of 12 months of verified housing history. But as Ms. Keith explained, the Assetwise Direct approval certificate did not require housing history.

Mr. Butler then shifted at trial and said, well, the certificate was invalid because the borrower alleged 12 months of housing history on his application. But Ms. Keith explained that housing history is not even a field that is input into Assetwise Direct by a user, so there was no way this information could have impacted Assetwise Direct's credit decision.

Whether viewed as plaintiff being estopped from alleging breaches of reps that a loan complied with credit terms and criteria or requirements for credit underwriting, or that RFC waived such compliance with such reps through the Assetwise Direct Criteria Agreement, the result is the same. Mr. Butler's breach allegations fail on Assetwise Direct approved loans that PRMI is permitted to challenge.

Now, Ms. Bangerter testified on direct examination that Countrywide allowed riskier loans than RFC, and she volunteered on cross-examination that Countrywide products were a lot more expansive than RFC's products.

In light of that testimony, the proposition asserted by plaintiff that PRMI, after Ms. Bangerter left RFC for Countrywide, blindly just sold a pool of subprime loans originated for Countrywide to RFC under some phantom agreement that RFC's Client Guide applied to those loans makes absolutely no sense whatsoever.

Mr. Crawford testified that PRMI did no such

thing. He was explicit that the pool was all Countrywide loans. And RFC understood this. "Countrywide product with CLOUT. Trying to get back the business that is getting pulled away from Countrywide." And RFC never followed up other than to ask if the loans were subprime.

So as we see on the previous e-mail, with any type of documents such as a bulk confirmation letter to assert that the Client Guide reps would apply to these Countrywide loans. There was no such agreement or communication, nor could there be, as the Countrywide loans were never intended to meet all the requirements of the Client Guide as they would have to be to invoke the Client Guide reps.

Now, Ms. Keith also provided no review of the application of different scenarios with respect to Mr. Butler's allegation on trust-level reps, and those numbers do not presume anything about Mr. Butler's origination-level allegations on the 12 sample loans that PRMI is permitted to challenge.

Now, starting with the 66 sample loans that Mr. Butler alleges breach trust-level reps, Ms. Keith explained that not accepting breach allegations on the pool-wide credit rep reduces that number to 48 loans; and not accepting the breach allegations on the pool-wide loan doc rep reduces that number further to 45 loans.

If the Court were not to accept the breach

allegations on loans and trusts where RFC made a fraud disclaimer, the number would be reduced further to 18 sample loans.

And it's important to note that this category includes five sample loans where Mr. Butler alleges a breach of the no-default rep, but that rep includes a qualifier that there's no default to the best of RFC's knowledge. Mr. Butler admitted he made no determination as to RFC's knowledge where such a knowledge component was included in the rep, and he alleged that a PRMI loan breached the rep. And not accepting breach allegations on the no default or MLS or pool-wide occupancy reps, the number of sample loans deemed to be in breach were reduced to eight loans.

Now, plaintiff is seeking $5.398 million from PRMI; and far from allocating PRMI's fair share of RFC's purported bankruptcy liabilities, plaintiff has failed to take into account many central issues. Those failures have the effect of substantially increasing PRMI's alleged damages.

At the instruction of counsel, Dr. Snow completely ignored the strength of claims and defenses. The evidence showed that these were significant issues that RFC did and would have raised.

Mr. Woll testified that a reasonable defendant would have viewed claims on earlier trusts differently than

claims on later trusts.

Dr. McCrary testified that these strength of claim issues were significant for PRMI. By wide margins, PRMI's loans were concentrated in trusts that were the subject of weaker claims compared to all at-issue loans. So this was true of the no-fraud rep; the fraud disclaimer, where there was a 50 percent difference; and the statute of limitations defense, where there was a 100 percent difference.

Plaintiff was required to account -- plaintiff was required under the law to account for differences in the strength of claims when allocating RFC's purported bankruptcy liabilities to PRMI. Plaintiff had every opportunity to do so.

The early vintage of PRMI's at-issue loans was no secret. By the time expert reports were submitted, PRMI was the only remaining defendants. There was no issue of, as Dr. Snow called it, litigation constraints.

And even after receiving PRMI's rebuttal expert reports identifying these strength of claims issues, PRMI -- or plaintiff's experts never even attempted to address them in their supplemental reports. Instead, plaintiff's damages methodology treats every claim on every trust identically, regardless of significant variations in the strength of claims and defenses, and Dr. Snow does so on the explicit instruction of counsel. The consequence of this is that

plaintiff has not proven damages to a reasonable degree of certainty, and its claims against PRMI therefore fail.

But even if plaintiff somehow were deemed to overcome its failure to comply with the law, Dr. Snow's damages estimate grossly overstates PRMI's damages. Dr. Snow's damages estimate assumes that all of Mr. Butler's originator and trust-level breach allegations are correct. As previously discussed, PRMI submits that the evidence clearly has shown that this is not the case.

First, all 12 loans at the originator level that PRMI is permitted to challenge are part of Dr. Snow's damages estimate. An adjustment deducting those loans or a subset of them from the 66 allegedly breaching PRMI sample loans, would change both the damages estimate and the confidence interval bounds of that estimate.

And second, at the trust level, Ms. Keith has presented testimony on the number of loans that are subject to breach allegations by Mr. Butler. This includes the breach allegations based on, or subject to, pool-wide credit grade and loan doc reps, the fraud disclaimer, the MLS no default and pool-wide occupancy reps. And an adjustment deducting being these loans or a subset of them would change both the damages estimate and the confidence interval bounds of that estimate.

Now, Dr. Snow agreed that at the time he developed

his sampling methodology he did not anticipate using sampling to allocate RFC's bankruptcy settlements. When he was told to allocate, he operated under the assumption, based on counsel's instruction, that non-at-issue loans did not account for a single dollar of the allowed claims, so he never sampled them.

Dr. Snow did not sample any of the 238,000 performing loans with 900 million in loss that is plaintiff's counsel did not deem to be at issue. Dr. Snow could have drawn supplemental samples for the performing loans, but counsel never asked him to do that. Instead, Dr. Snow assumed a breach rate for the PRMI performing loans, despite having no specific information about the breach rate for those loans.

So Dr. Snow presented a conservative assumption in his supplemental report to deal with his lack of data; and under that conservative assumption, Dr. Snow's damages estimate would increase by $207,315.

Dr. Snow also did not sample any loans from the nondebtor-sponsored trusts which did not fit counsel's at-issue loan definition. Because the NDS trusts were not sampled, and therefore none were re-underwritten, Dr. Snow made an assumption about the breach rate of those NDS loans. Dr. Snow did not have information about the NDS trusts as to originators, the representations and warranties that RFC

made, or how many of those trusts were subject to the statute of limitations defense or were not subject to it.

So Dr. Snow prepared an analysis with more conservative assumptions for the NDS trusts; and according to that analysis, Dr. Snow's damages estimate would decrease by $125,318. In the real world, statisticians and economists own the flaws in their data and methodologies and account for those flaws. As Dr. McCrary testified, you do that by bounding at the maximum possible impact. You don't just make another flawed assumption.

Dr. Snow's damages estimate is subject to wide margins of error that create a large confidence interval. Due in part to the fact that Dr. Snow designed his samples to provide a count-based breach rate, but then used those samples to determine a loss-weighted breach rate, he went well past his predicted maximum margins of error.

This results in a total margin of error of 25 percentage points, of roughly plus or minus 25 percent points. In dollar terms, it's a range of $2,680,000.

Dr. McCrary addressed what to do in this situation. When you have a wide margin of error, you can have little confidence that the point estimate represents the true amount of damages. And in that situation Dr. McCrary explained the proper approach is for the designer of the sample to bear the cost of its imprecision

by taking the lower bound.

Now, Dr. Snow determined an estimate of damages for loans and pools wrapped by monoline insurers by combining the five monoline settlements into subsets of his PRMI and global populations, and this approach suffers from numerous problems.

Dr. Snow estimated blended monoline breach rates across pools for all settlements. Now, despite agreeing that monoline breach rates would not be the same across pools, Dr. Snow applies the same PRMI and global breach rates across pools. And Dr. Snow agreed that there was no statistical justification for his decision to include 39 of the 105 global monoline subsample loans that were from pools with no net insurance payments.

When you look at the number of loans for each monoline insurer in his global subsample, the numbers are very small. 45 Ambac loans, which is overstated for reasons I'll discuss; 38 FGIC loans; and 22 MBIA loans. Dr. Snow is not aware of any RMBS case in which an expert has estimated a breach rate based on sample sizes that are this small. And when Dr. Snow estimated the global breach rates based on each monoline settlement from his tiny subsamples, those breach rates varied from 55.5 percent to 90.9 percent.

So in light of all these problems, Dr. Snow developed an approach that he called the lower bound

non-extrapolated analysis for alleged monoline damages. This non-extrapolated calculation is $115,563 lower than his original monoline estimate.

And even this amount is overstated since it includes 27 PRMI loans that were not in the one RFC-sponsored Ambac trust that was the subject of an origination based proof of claim in the bankruptcy. On this point Mr. Hawthorne agreed that Ambac never filed an amendment to its proof of claim, and he didn't know if there was ever some other unidentified attempt or undefined attempt by Ambac to amend its proof of claim.

And nothing in the stipulation of settlement discusses any origination claims against RFC on any other trusts; only the timely-filed proofs of claim against the various debtors are discussed. There's no evidentiary or statistical justification for including loans from these other Ambac trusts in Dr. Snow's samples and damages estimates, and Dr. Snow agreed that he had not accounted for this issue in his analysis.

To the extent plaintiff talks about PRMI's fair share of RFC's proportionated bankruptcy liabilities, its approach to damages has the opposite effect. It substantially drives up PRMI's alleged damages. Plaintiff's instruction that Dr. Snow ignore the central strength of claims issues in his allocation methodology is contrary to

the law. As a result, plaintiff's claim must fail.

But even if the Court were to disagree, Dr. Snow's damages estimate does not account for plaintiff's failure to establish many of its breach allegations and it does not include adjustments for the series of assumptions that he made in his sampling and damages methodologies. As a result, further adjustments are entirely warranted. Indeed, they all were offered by Dr. Snow himself in light of the flaws in his damages estimate.

In the real world, not every case is the same. The evidence has shown that PRMI was different for a whole host of reasons. Plaintiff ignores these facts entirely, but this Court should not.

Thank you.

THE COURT: Thank you, Mr. Johnson.

We will take about ten minutes and plaintiffs can get ready. Court is adjourned briefly.

(Recess taken at 2:30 p.m.)

* * * * *

(2:40 p.m.)

IN OPEN COURT

THE COURT: Is the plaintiff prepared to close?

MR. NESSER: Yes, Your Honor.

THE COURT: Very good. Before you start,

Mr. Nesser, have the parties discussed whether or not the demonstratives from the closings should be -- a copy should be shared with the Court?

MR. NESSER: No, Your Honor. I don't know that we have --

THE COURT: Why don't you talk about it afterwards. I mean, I think the Court would appreciate a copy from each side. You may proceed.

MR. NESSER: Your Honor, before I proceed, I did want to note, I don't know whether it's required, I suspect not, but for the record the Trust renews any of its summary judgment motions and preserves its arguments in response to PRMI's.

Okay. So, Your Honor, first before I start, I did want to acknowledge and thank my team at Quinn Emanuel and Spencer Fane and Carpenter Lipps and our graphics people, who have all done incredible work around the clock for a long period of time, and hopefully I will be able to communicate what they have put together for me.

So, Your Honor, I think it's fair to say that we are where we said we would be. In opening what we said to the Court was that we would prove that PRMI's at-issue loans were overwhelmingly in breach and that the question would not be whether they owed money, but rather how much.

We also said that we would present a practical,

common-sense approach to determining PRMI's fair share, reflecting the way that people in the real world make investment and litigation decisions, and we did that as well.

And third, we said that PRMI and its experts would respond with hyper-technical formalistic readings of documents and the law that they would seek to convert meaningful and enforceable loan-level representations into meaningless unenforceable pool-wide remedies, and that they would make repeated demands for false precision up to and including the remarkable assertion that PRMI's fair share for its proven breaches is zero. And, Your Honor, that's what happened.

In my presentation today I'll be addressing three sort of big groups of issues. The first is PRMI's breaches. The second is causation, and then finally damages.

And before I start, on the first element I think the issues are pretty well defined. There are a dozen loans. There are Assetwise, AlterNet and Countrywide issues, and we'll talk about those in due course.

But on the second and third issues, which I've said are causation and damages, I did kind of want to frame things upfront because I think there's been a certain myopia, maybe is the right word, in the presentation that we heard from PRMI over the course of trial, both in closing

and in the evidence that was proffered.

If one listened to PRMI's trial presentation, one would be forgiven for thinking that this case was about whether the statute of limitations defense was viable or whether a breach claim on an MLS rep was viable, or whether any of the other 15 claims and defenses was viable, and whether there are differences in the strengths of those various claims and defenses.

But, Your Honor, that is not what matters. What matters, if we consider what actually does matter, what we find is that causation and damages not only are proven, but actually are proven with no dispute from any PRMI witness; and it's remarkable to say that, but I believe it is true.

For causation, Your Honor, what matters is whether PRMI's breaches created a risk of liability. If the answer is yes and we have proven causation, and the evidence at trial proved that the answer, in fact, is yes because the parties in the bankruptcy reasonably treated the Client Guide as a proxy for the trust representations and because RFC faced reasonable risk of liability on each of the specific breaches at issue.

And, Your Honor, it's astonishing, but it is true that no PRMI witness contradicted those assertions. Not one. We heard a lot of testimony about, well, the credit grade rep didn't mean this, and the MLS rep didn't mean

that, but we heard no testimony from any witness on their side talking about whether there was an absence of litigation risk, and that's the question. So that's causation.

And then on damages, what matters is what a reasonable person would have done, what a reasonable allocation would have been. And whether, as relevant here, whether it would have been reasonable to allocate based on breaching losses in light of all of the facts and circumstances and claims and defenses that were at play in RFC's bankruptcy.

If the answer is yes, then the allocation issue is resolved. And the answer, Your Honor, is yes because the testimony is, again, undisputed that a reasonable person in RFC's position, faced with tens of billions of dollars of potential liability on hundreds of thousands of loans across hundreds of trusts, in the real world would have settled on the basis of breaching losses.

There is no evidence, and there's no witness who testified that a party in RFC's position would or could have allocated based on speculation about the likelihood of success on each of a long list of untested, interconnected defenses and other issues on a loan-by-loan basis. And, Your Honor, it really is the case that there was no witness who contradicted those conclusions. The closest we heard

was Mr. Woll.

But as Your Honor remarked at the pretrial conference, Mr. Woll was talking about four or five cherry-picked issues, and he opined about them explicitly, all else equal, and he didn't take into account the full picture of what was going on in the bankruptcy, including the dozen other some odd issues that one would have had to have taken into account if one were serious about looking at strength of claim.

And so there is no expert who testified that a strength of claim allocation would have been the reasonable thing to do, would have been a feasible thing to do; and as we'll discuss, the evidence is that it would not have been reasonable or feasible. And so that's allocation.

So my mantra, hopefully, will be causation requires only real-world risk, not proven liability; and allocation only requires real-world reasonableness, not false precision.

And I think what sort of unites those issues and the way in which, you know, the way in which they've been approached by PRMI is that I think PRMI's approach is effectively the kind of approach that one might have taken if one were in RFC's position litigating the underlying claims in the bankruptcy, right? But that's not what we're doing. This is an indemnity case and the Court has

recognized that repeatedly over the years, and the fact that it's an indemnity claim has implications for the law and for the facts; and we've tried to, I think, take account of those and I think what happens is that PRMI just has not.

So that's a long-winded introduction. I'll turn to the issue of breach.

So of course the Court has already determined that the Client Guide and the AlterNet Guide apply to all of the at-issue loans. There's no dispute about that. The Court heard testimony from Mr. Butler that 94 of those 150 loans in the sample he reviewed had at least one material breach; and so, again, that's almost two-thirds of the loans that he looked at had a breach, and that's what we said you would hear -- and that's what we said the Court would hear in opening and that's what the Court did hear.

For 82 of the loans, Mr. Butler's breach determination is not disputed because those were determinations made in RFC's -- in the Trust's sole discretion. For the remaining 12, we do have disputes; and I think the evidence at trial indicated that the Trust's positions are correct and PRMI's positions are not.

So I'll start with AlterNet. There are seven AlterNet loans. Ms. Keith's primary objection on the AlterNet loans is that somewhere, we don't know where, but somewhere Ms. Keith says I think there's probably another

AlterNet Guide that Mr. Butler never found. And not a single witness supported -- fact witness supported that speculation. We asked Ms. Keith, Have you ever seen a document that suggests that such an AlterNet Guide existed in the world at any point in time? She said, No.

And, in fact, she conceded that, quote, "Nobody here knows whether the AlterNet Guide changed over that three-year period." And so her opinion on this issue, Your Honor, was completely speculative. And more broadly, the notion that in six years of litigation with all the work that's been done by both sides, somehow some document out there that just slipped through the cracks is, we think, not correct.

And for four of the seven AlterNet loans, Your Honor, that is Ms. Keith's only rebuttal to the breach determination. And so if Your Honor rejects that notion, then those breaches are proven.

For the remaining three, the Court heard loan-level testimony from Mr. Butler and from Ms. Keith. I expect we'll treat that in the Findings of Fact and Conclusions of Law and won't bore the Court with loan-level discussion here. So that's AlterNet.

The next issue is Countrywide, and there's one loan. And, again, it's odd what's happened because the facts, and I think the legal conclusions to some extent

are -- it may be an exaggeration to say not disputed, but certainly this is not the position that I think even we expected to be in.

So on that, there's one Countrywide loan. It's undisputed that there's about $700 a month debt that the borrower took out a month or so before the at-issue loan. He never disclosed it, but that was a misrepresentation. It also triggered a DTI violation. Ms. Keith doesn't dispute that the debt actually existed, doesn't dispute that it ought to have been disclosed, and doesn't dispute that under any set of guidelines that exist in the world, I'm exaggerating a tiny bit, but under any set of guidelines with which these familiar she doesn't dispute that a misrepresentation would be a breach. And so why does it matter, why does it matter at all whether the Countrywide guidelines applied or the RFC guidelines applied? It just doesn't.

And I won't belabor it, but the Court heard on the issue of whether a misrepresentation is a breach under any set of guidelines, Mr. Crawford testified to that. Ms. Flitton testified to that as well.

Your Honor, that's all I have to say on Countrywide.

On the Assetwise loans, there are five of them. One of them is also an AlterNet bucket. It's been a lot, a

tremendous amount of time and attention and money spent on these five loans, for better or worse, and I'll address them as best I can quickly.

So first of all, this has been pitched as a waiver and estoppel situation; but, Your Honor, waiver and estoppel, the Court doesn't even need to get to waiver and estoppel because on every one of these five loans Mr. Butler identified a breach of a representation and warranty that PRMI concedes remained its responsibility even under loans submitted through Assetwise. And so the notion that there's anything to do with waiver or estoppel on those breaches is just besides the point because we've asserted breaches that they don't even contend were waived and that they don't contend were the subject of an estoppel.

And, Your Honor, as we discussed in the pretrial conference, with the exception of the AlterNet loan, those breach determinations were made in the Trust's sole discretion and so are not subject to challenge, just like any other breach determination.

And to the extent the Court disagrees, by the way, on sole discretion issue with respect to this point and elects to look and rule on each of these underlying breach determinations, I did want to point out one thing that perhaps would have gotten lost in the shuffle. Certainly I was made more sensitive to it recently, which is one of the

representations and warranties that PRMI concedes remained applicable even in an Assetwise regime is the representation and warranties in the Client Guide that required PRMI to prudently underwrite all of the loans that it was issuing and selling to RFC. So the prudent underwriting requirement applied all the time even in PRMI's view.

And why that matters is that because on I believe four out of the five Assetwise loans, at least, Mr. Butler testified that those loans were not prudently underwritten. And so there were also obviously technical issues, technical breaches. What does the verification of employment look like and what does the W-2 look like and so forth, but -- and the Court, of course, you know, may elect to look at those issues and if it does it will find that Mr. Butler was correct, we believe.

But even putting aside those technical issues, there's this prudent underwriting issue, and that applies and we think demonstrates a breach in any universe apart from waiver and estoppel. And Mr. Zitting, I should say, was I believe -- at least it was Mr. Zitting who testified that PRMI had to make sure that every loan was prudently underwritten and that was his testimony at trial.

So we think the Court need not address waiver or estoppel. We don't think you need to get there. But if the Court does get there, what I believe the Court will find is

that there's been no evidence sufficient to support PRMI's burden on an affirmative defense of waiver or estoppel.

As to waiver, it's undisputed that the Client Guide and the AlterNet Guide required waivers to be in writing. It's undisputed that there was no such writing. Certainly I don't believe any such writing was introduced in the course of trial. And so we don't think that that's a meaningful argument.

With respect to estoppel and to the extent that there's a waiver by conduct kind of an argument, likewise, we heard promise after promise over month after month about how at trial there was going to be evidence that satisfied the Court's standard on waiver and estoppel. And the plain answer is that there was no such evidence introduced. Not a single witness from PRMI has been able to identify a single conversation, or even a single person at RFC who told them that RFC would not seek to enforce the provisions of the guide as long as they complied with Assetwise.

And putting aside kind of all the niceties of what the precise legal standard is, what we heard from Mr. Zitting remarkably was what he is relying upon is his feelings on the issue and his vague, quote, vague recollections. That's not my word vague. He said his recollections on these issues are vague.

And so I'll read just a little bit of it.

Mr. Zitting was asked, "You can't name a single RFC representative who told PRMI not to do more than what the Assetwise system is asking for?" He said, "Oh, I vaguely remember Renee -- I don't remember specific dates or, you know, the setting of the conversation. This was so many years ago, 15 or 19 years ago. I wish I did. It was just so long ago, but that's essentially what the communication always was." Et cetera.

And then the follow-up question was, "Do you recall Ms. Bangerter actually saying that to you?"

And the answer was: "Again, I couldn't place the date or the setting. It's just more of a feeling of that conversation and others over the phone with different people at RFC. Hard to place exactly when." And so on and so forth.

The Court also heard from Mr. Crawford who testified similarly that he can't recall any specific person at RFC ever stating -- I think we have a slide -- ever stating that an Assetwise approval superseded the AlterNet or Client Guides. That he can't recall anyone from RFC representing that certain provisions of the guides were inapplicable, and that he never discussed the representations and warranties applicable to any of the loans PRMI sold to RFC with anyone from RFC or from PRMI.

And it was surprising I think to all of us, at

least on this side of the room, that Mr. Crawford was the guy who was represented as he's the one who is going to come and support this defense. And what did he say over and over again? Well, I wasn't the reps and warranties guy. I never discussed representations and warranties with anybody. And so if Mr. Crawford is the witness who purportedly supports this defense, we think clearly the affirmative defense has not been proven.

Your Honor, that's what I have to say about breach, the first big topic for today. I'll turn now to the second kind of big bucket of issues, which is causation.

So, Your Honor, the legal standard is clear. Your Honor has held that we don't need to show that PRMI's breaches were the cause. We need only to show that the breaches were a contributing cause of the liabilities that were settled in the bankruptcy. And because this is an indemnity case involving a settlement, the contributing cause standard is not whether those breaches actually -- I'm sorry -- is whether PRMI's breaches increased RFC's risk of liability on the claims asserted by the trusts and the monolines and that was settled.

And we know, Your Honor, undisputed testimony, we know that PRMI's breaches or the types of breaches that we've identified in PRMI's loans did give rise to risk that RFC settled in its bankruptcy.

So, first, we had testimony from RMBS trusts -- first we had, I'm sorry -- first we have evidence that the RMBS trusts and monolines asserted claims for origination defects. RFC's -- what's going on with this? I'm sorry. I'm sorry, Your Honor. RFC's representation --

MR. JOHNSON: Sorry, Your Honor. Objection. This is the very issue that we discussed with the Court about relying on the testimony for the truth of the matter asserted. The Sillman declaration on the previous slide, or I don't know if it is the next slide.

THE COURT: Mr. Nesser, do you wish to respond to that objection?

MR. NESSER: Maybe Mr. Scheck wants to take this one.

MR. SCHECK: Your Honor, I believe the objection was not to what we're actually about to talk about, but rather to a different slide; but in that respect, the objection should be overruled because frankly what Mr. Sillman testified at deposition about this, and that's in evidence as part of the deposition designation. I mean, we can get to it when it comes up, but this has been addressed. It's been addressed in connection with Mr. Hawthorne's testimony as well.

MR. JOHNSON: They expressly represented that they were admitting this, and the Court said it was admitting it

for another purpose. If they wanted to use Mr. Sillman's deposition, they could have.

THE COURT: All right. I don't think we're there yet. Right now we're with Mr. Lipps, so let's wait until it comes.

MR. NESSER: Thank you, Your Honor. So what I was about to say is, again, the question is risk and first point that we want to make here we know there was risk because we know the claims that were asserted against RFC were claims for origination-level breaches. Right? We had Mr. Lipps testify that RFC's rep and warranty breaches in MBIA, quote, were a result of the characteristics of the loans. He testified that Kathy Patrick and Talcott Franklin alleged breaches of the loan-level characteristics in the trusts and were making rep and warranty claims.

And we have testimony -- we have a document that's in evidence indicating that the RMBS trustees had repurchase claims against the debtors on account of any defective mortgage loans sold by the debtors to the PLS trusts. Finally, we have Deutsche Bank's proof of claim that asserted claims as to defective mortgage loans.

And so there's no real -- I don't think there's any real dispute about this. Those were the claims that were being asserted. Now, it's not just that those were the claims that were asserted, though. This is also an issue of

how were those claims assessed. How was RFC's risk of liability on those claims for origination-level breaches assessed? And the answer is they were assessed based on the existence or nonexistence of origination-level breaches.

And so I think this is the same slide that Your Honor saw in our opening statement. Mr. Sillman testified --

MR. JOHNSON: Your Honor, I renew my objection. It's not his testimony.

MR. SCHECK: Your Honor, there is a citation for the left side of this for Mr. Sillman. That is from his deposition. That is precisely this because the questioner read quote by quote from the declaration and Mr. Sillman answered the question.

So if Mr. Johnson's objection is that we should replace this DTX-538 with something else, that's fine, we will do an amended slide; but it's not a well-taken objection in the first instance because the declaration itself is admissible to show what it is that was being done. RFC -- everything they have said in this case is about what did the reasonable defendant at the time know, and we have disputes with that.

But what RFC did, right, and what Mr. Kruger was aware of at the time of the settlement was this. This is what he was looking at, what Mr. Sillman did; and so this

objection, which is frankly unnecessary interruption, should be overruled for both of those reasons, substantively and as a matter of form.

THE COURT: Why don't we just substitute on this slide at some later date the testimony of Mr. Sillman.

MR. NESSER: Thank you, Your Honor.

So we have Mr. Sillman's testimony. We have as well Mr. Pfeiffer's testimony. He testified that the re-underwriters determined whether the initial origination was done in conformance the guidelines. He said that they were focused on the reps between the debtor and the trust, and we were focused on the underwriting guidelines during the underwriting process as well.

We have testimony from Mr. Morrow, and Mr. Morrow represented the committee that was opposing the settlement and he did underwriting too; and what he said was the re-underwriting process was narrowly tailored to identify material compliance with the ResCap guidelines.

And so Mr. Hawthorne, who is the only expert in this case who has looked at the work done by the re-underwriters in the bankruptcy, testified that that's what everybody was doing; they were determining breach rates by re-underwriting against the guidelines. That testimony by Mr. Hawthorne is not contested.

We also have undisputed testimony, Your Honor,

that the -- that in fact each of the representations at issue did, in fact, increase RFC's risk of liability. This is a pretty dense slide, but Mr. Hawthorne testified that it was reasonable for RFC to not materially distinguish its risk of credit grade, loan program, and express guideline compliance reps. He said there was risk on all of them.

Mr. Hawthorne said the no fraud and the no default and the MLS reps gave RFC a risk of liability, an underlying misrepresentations. Mr. Butler identified instances where a material breach by PRMI created risk to RFC for a potential repurchase, and he went on.

Ms. Farley, as well, testified we believe that we had risk if the reps we're providing on the Mortgage Loan Schedule were inaccurate. Ms. Farley, a fraud disclaimer did not eliminate RFC's risk of fraud.

And by the way, I wanted to acknowledge Ms. Farley is back here today with us. We appreciated her coming.

And so over and over and over again, Your Honor, the witnesses that the Trust put up testified explicitly about risk, right? They said the question is risk and risk related to what? Risk related to these representations and so we'll deal with it, but ultimately the question is risk and that's what they were opining about.

And by contrast, the experts that we heard from on PRMI's side didn't address risk at all, or to the extent

that they did they, conceded that it existed.

So Mr. Schwarcz -- I'm sorry, Professor Schwarcz said the issue of risk of liability is beyond the scope of what I'm purporting to opine on in my report.

And Mr. Burnaman said, I'm not an attorney, so I'm not qualified to offer a legal opinion.

And Ms. Keith testified that she was also not testifying about RFC's legal liability. So none of them had a word to say about risk.

What we then heard from Mr. Woll was, well, Mr. Woll identified statute of limitations and a couple of other issues where he said, in fact, there were claims, but they were defenses, so that was effectively an acknowledgement that risk existed on those.

He acknowledged that the fraud disclaimer was uncharted territory, and he said that uncharted territory means there's risk. He did not dispute that there was case law supporting the Trust's positions on the MLS and the no-default rep during the settlement period, and he never once opined that there was an absence of risk as a general matter on the various reps that we have been discussing in the case other than those couple.

And so Mr. Woll just didn't address the relevant question. He kept himself confined to a very narrow issue, and that's fine, but that narrow issue doesn't resolve the

question of causation.

And so, Your Honor, this is in our view as far as the Court needs to go. We have the evidence that the claims asserted were claims of risk on the origination level. We have evidence that every single party in the bankruptcy was underwriting to the origination reps. We have expert testimony and fact testimony that's been introduced that there was risk, and we have no expert or fact testimony on the other side.

I want to address, before I move on, something that Mr. Johnson said. He said, Well, there's no evidence that like a credit grade rep was ever asserted in the bankruptcy, and that argument I think has at least two problems associated with it.

One of them is they concede that, for example, a substantial compliance rep created risk. There's no proof of claim that asserts a substantial compliance rep. That's just not how it worked. The claims -- the proofs of claim didn't assert, like, here's the precise contract provision that my claim relates to. The proofs of claim said representations and warranties. And that's why everybody in the bankruptcy was underwriting to the origination reps. That's point one.

Point two is if Mr. Johnson is correct that nobody had in mind ever, you know, that there was liability on

credit grade or potential liability on credit grade or loan program or all the rest, if that's true, then what that means is that Mr. Johnson is asking Your Honor to infer that every single party in the bankruptcy and Judge Glenn were just wrong. They just made a mistake. And we know that Professor Schwarcz in other context said it was a mistake.

But on this issue also they're just asking Your Honor to say everybody was wrong, the people there at the time incentivized to get this right all just made a mistake, and that's just not correct.

So, Your Honor, I don't want to talk too much about in the weeds on what does the MLS rep mean and what does the fraud disclaimer mean and so forth because I think what I've been trying to communicate, hopefully clearly, is that that's not the question that this Court is primarily being asked to answer. The primary question is whether there was risk, not whether Mr. Butler is correct when he says that the MLS rep means X. But I do think it's important just to briefly spin through it and so I will try to do that.

So in my opening, and Ms. Farley I think testified eloquently on this, you know, what I said was that all these trust rep disputes seem as if there was, you know, a disparate group of 12 different language disputes. But what I said is really they were a dispute about one document.

There's one dispute about one document. That document was the Assignment and Assumption Agreement.

That was a tiny exaggeration because the loan program rep, of course, is in the PSA, but in substance, right, the question and the dispute that divides the parties is whether the representations in the Assignment and Assumption Agreement were meant to be and understood as meaningful, enforceable, loan-level representations and warranties. Ms. Farley testified that of course they were. That's literally what that document was for, right?

That we had other deal documents that were intended to, and that did, make disclosures on a pool-wide basis, right? That was dealt with in the Pro Supps and so forth, right? That the function of the Assignment and Assumption Agreement and the function of the PSA, as relevant here, was precisely to make loan-level representations to convert those disclosures into things that could be remedied on a loan-level basis.

And the Court heard no testimony to the contrary regarding the purpose of those documents; and I think that that, as I said, you know, on day one, I do think that that in a sense resolves all of these kinds of, you know, different -- six or ten different language disputes.

So, for example, on the MLS rep and the no-default rep, I won't rehash the plain language arguments. I won't

rehash the court cases. But Ms. Farley testified that the MLS rep -- that PRMI's position on the MLS rep, in her opinion, is illogical because it was a fundamental representation. Everybody was looking at the MLS.

What Ms. Farley said is that RFC took steps to confirm the substantive accuracy of the information on the MLS. Ms. Farley testified that when people asked to have additional fields added, RFC resisted doing that because RFC understood that it would be acquiring additional substantive liability if that information was substantively wrong.

And likewise, on no default, Ms. Farley testified from her personal recollection. She had a phone call with a ratings agency. She said, Hey, maybe we can revise this so that it limits no default to payment defaults and that she was laughed at. She was embarrassed -- she had been embarrassed to ask. And that testimony on MLS and on no default is consistent with the purpose and meaning of this Assignment and Assumption Agreement.

So what do we get from PRMI's experts? We got PRMI's experts ultimately just twisting themselves in knots, arguing that the representations don't mean what they say.

So one example, among many, is that the Court heard Mr. Schwarcz talking about the no-default rep and he was asked -- Professor Schwarcz, I apologize, I keep doing that. Professor Schwarcz was asked about the no-default rep

and he was asked about one version of the no-default rep that specifically carves out payment defaults, right? So it specifically said there are no defaults excluding payment defaults.

And so the question was, Well, what does that mean? If your position is no default is only payment default, what does this mean? And he says, Well, I don't know how far it would go beyond payment defaults. I don't know -- I'm not sure how far I understand that testimony other than that perhaps it's a concession that it does go beyond payment defaults; and to the extent that it is, that's consistent with our position. To the extent that it's not, I just think this testimony doesn't make a whole lot of sense. And that's all I'll say for now on those.

On the credit grade and loan program reps, the second bucket of these, Ms. Farley testified clearly what those were about and what they were for. She said that, as I indicated a moment ago, right, that there were specific securitization shelves designed to have loans with riskier loan programs and for those shelves the investors said I'm not satisfied with the pool-wide representations being made in the Pro Supp. I want it to have teeth. Those were Ms. Farley's words, right? And so what was negotiated was a clause in the Assignment and Assumption Agreement, right, that had this loan-level remedy; that that was the purpose

and that that was the effect. And the same on the credit grade rep.

And that makes sense, Your Honor, right? But again, and part of why it makes sense, Your Honor, is that the Assignment and Assumption Agreement and the PSA in relevant part attach these representations to a repurchase remedy, right? They all say that the remedy for a breach of this credit grade or loan program rep is repurchase. And every witness in this trial agreed that the repurchase remedy is strictly a loan-level remedy. And so if there were any doubt on the question of whether the credit grade and loan program reps were meant to be loan-level remedies, loan-level reps, the answer, well, it's attached to a loan-level remedy. What else could it mean?

And so we asked the experts on PRMI's side about this and again, we got just this testimony that that's difficult to comprehend.

Mr. -- Professor Schwarcz, as the Court will perhaps remember, testified that, Well, it was a mistake. That was his language. He said it made no -- it makes no sense, quote; and he said, quote, It's poor drafting. And so that was his explanation. Your Honor, that's frankly it's not an explanation. It's a concession. It's a concession that his position about the meaning of the loan program and credit grade rep is impossible to square with

the actual language of the contracts as they exist.

And, you know, fundamentally the notion that these representations, negotiated and drafted by dozens of the country's most sophisticated lawyers and business people, hundreds of times over a decade, across billions of dollars of transactions, somehow just over and over and over again just had mistakes in them is difficult to take seriously. Certainly there's no evidence that anybody at any point in time has ever said, other than Professor Schwarcz, that those clauses were mistakes.

And by the way, all of this is particularly difficult to swallow given Professor Schwarcz's testimony that RFC was, quote, a highly-sophisticated sponsor. And so we think this is pretty clear.

On the fraud disclaimer, the last piece of this causation, which I recognize is going on a little long, Ms. Farley testified the fraud disclaimer was not a silver bullet against loans with fraud in the origination; that RFC didn't think it was going to be effective necessarily because fraud has a very high standard of proof and the disclaimer on its face does not cover misrepresentations.

So, again, in response we have PRMI's paid experts -- there's no fact witness on any of these issues other than Ms. Farley -- so we have PRMI's paid experts coming in and testify to things that really just --

Ms. Keith said, you have to read the fraud disclaimer, quote, in the literal way it's written. But then she goes on to say that it applies to both fraud and misrep even though misrep is not written.

And Professor Schwarcz opined that the securitization agreements were drafted by highly-sophisticated counsel using, quote, plain language that does not, quote, operate by implication. But that he nonetheless believes that the fraud disclaimer covers misrepresentation, I guess, by implication even though the word "misrepresentation" doesn't appear in the document.

Mr. Burnaman, like PRMI's other experts, testified that he didn't differentiate between fraud and misrepresentation, but then he admitted that legally they are, in fact, different.

So if the question is whether they're legally different, which it is, and the answer is Mr. Burnaman agrees.

I do want to, by the way, just make a note. Professor Schwarcz's testimony that fraud and misrepresentation mean the same thing was a pretty remarkable thing to have heard from a professor of law at the Duke Law School. And, but, you know, this is where we are.

Your Honor, PRMI also went on for pages and pages

in its opening making promises about repurchase evidence that the Court would hear about supporting its trust rep theories. The Court heard none -- no evidence, no such evidence.

So, Your Honor, before I move on from causation, I do want to take a step back, right, and again put all this together and ask the real-world question. People are making jokes about the MTV show, *The Real World*. But take a step back and ask in the real world, like, how would this have played out in PRMI's imagination, right?

So in PRMI's imagination, RFC and its counsel would have stood up in court and told Judge Glenn, right, I know that there are all these rep and warranty claims being asserted against me, but I'm not liable, and do you want to know why? Number one, I'm not liable because the MLS and the no-default reps don't mean what they say, because the credit grade and loan program reps were a mistake, and because, oh, by the way, my loans were replete with fraud and so I'm not liable because actually my loans have fraud in them.

And on top of that, what they would have had RFC do is to say that the loan program and the credit grade representations, that those were only pool-wide remedies, right, and so that people would have had to go out and underwrite every single loan in the pool in order to

determine whether those were breached. That was a process, Your Honor, that Ms. Keith, and I believe others of the experts testified, would just not have been workable, right? It would be, I think the quote was, mind-numbingly complex. Right?

So what they would have RFC do is to say we have to engage in this mind-numbingly complex, basically impossible task of re-underwriting every loan in the pool in a context where, real world, what would have happened? What would have happened is they would have found more breaches. And that would have been obviously opposite of what RFC would have been trying to accomplish. And so it's just not plausible that this is how things would have progressed.

So causation. The third and last piece of this is allocation. Your Honor, damages only arises if this Court has already determined that PRMI's loans are in breach and if causation has been proven. And in that context, the Court has already recognized that the law provides some flexibility, right?

Eighth Circuit has explained that once the fact of loss has been shown, the difficulty of proving its amount is not a barrier to recovery as long as there's proof of a reasonable basis upon which to approximate the amount.

Your Honor in the summary judgment, Common Summary Judgment Order held to prove damages a plaintiff must offer

a reasonably certain, though not necessarily mathematically precise, basis to demonstrate who owes what for its claims.

And so the question, Your Honor, is not whether the allocation approach that we've suggested is perfect. The question is whether it's reasonable. And as I said, you know, upfront at the top in my promised mantra has not materialized, is that allocation only requires real-world reasonableness, not false precision, and what PRMI is advocating for would amount to false precision.

So how do we know that the breaching loss allocation approach that we've proposed is a reasonable way to proceed? Well, we know that for a number of reasons. Number one, first and fundamental, I want to flag this as its own issue, its own piece of evidence, is we know that it's a reasonable way to allocate the RFC settlement because it is how the parties allocated the RFC settlement.

And the response that we heard at various points from PRMI's witnesses is, well, no, no, that was just an allocation between the plaintiffs and so that doesn't count. But, Your Honor, that's just wrong. The allocation was a part of the plan and a part of the settlement that was proposed and supported explicitly by RFC, by the trustees, and by others; and it was part of the plan and part of the settlement that was explicitly approved by Judge Glenn.

And so -- and Judge Glenn held that the settlement

was fair and reasonable and, quote, in the best interest of the debtors and the investors in each RMBS trust. And I should have also noted that the Creditors Committee as well was a party to that allocation.

And so the notion that this was just a plaintiff's side allocation, it doesn't matter for purposes of this case, is wrong. And more fundamentally, the notion that the actual allocation by the actual people in the real world dealing with this in real time is not relevant, which is I think effectively what the PRMI's witnesses have been suggesting, also is in our view just not correct.

So that's number one, right? We know it's reasonable because that's how people actually did it.

Number two, we also know it's reasonable because Mr. Hawthorne testified that every RMBS settlement of which we are aware, every major one, allocated either on the basis of net losses or on the basis of breaching losses. Nobody on either side has provided any evidence to the Court of any case in history in which anyone has allocated based on strengths and weaknesses or statute of limitations in the way that PRMI is suggesting.

And, Your Honor, these allocations, by the way, again, are not just plaintiff's side allocations. These are allocations approved by courts across the country, including Judge Kyle in Ramsey County recently; and each of them was

of course not only -- was of course approved by trustees, right? The trustees. And the reason why that matters is the trustees have duties to act for the benefit of the very people who had the most at stake, for the people who are getting the money. And Mr. Woll admitted that the trustees had duties to all of their investors; that he was not opining that the trustees had breached those duties, and that he had no basis to believe that the trust investors were just indifferent about what they were going to receive.

So this is the second kind of big category of evidence for why the breaching loss approach is reasonable. And what's the alternative? What's the alternative to a breaching loss allocation that we've heard from PRMI?

So they argue that, well, we should have allocated based on strengths and weaknesses. And as I said to begin with, there is no evidence of any party in history having done that. And number two, none of PRMI's paid experts were able to come in here and testify that that's what RFC could have done, or should have done, under the circumstances of the bankruptcy, all things considered.

And there's undisputed evidence that, in fact, it would not have been possible, not have been feasible to allocate in the way that PRMI is suggesting. And so Mr. Hawthorne testified, "I believe that assigning probabilities, precise quantitative probabilities to

different litigation factors like these inevitably requires sort of false precision."

And he also testified, "Trying to put specific numbers to a claim is always going to be contestable and it gets increasingly unrealistic if you try to deal with a number of intersecting probabilities and numerically derive some kind of quantitative assessment of the likelihood of success as a whole."

And finally, Mr. Lipps in his -- in the bankruptcy said, "In order to conduct a litigation risk --

MR. JOHNSON: Objection.

MR. NESSER: Perhaps I could finish the sentence, but...

THE COURT: All right. Hold on.

Mr. Johnson? Mr. Johnson, do you want to --

MR. JOHNSON: Yes, he is using Mr. Sillman again as an expert. Or I'm sorry, Mr. Lipps as an expert for the truth of the matter asserted.

MR. SCHECK: Your Honor, if I may, before -- after the last disruption I thought about this a little bit more and I thought about the slide that Mr. Johnson put up of the MBIA objection. And it said, well, 80 percent of the trusts don't have the substantial compliance reps. And I thought, well, what's that being offered for? And he would have to say -- can't say it's for the truth. Can't argue that

that's for that there were differences, right? It has to be that the parties were aware of that; that that was something said by a participant in the bankruptcy.

Now, I would ask how is that distinguished? Because otherwise this disruption is just what it is and needless disruption.

THE COURT: Mr. Johnson, that is a point that crossed my mind as well when you referred to the MBIA objection. How do you respond to that?

MR. JOHNSON: The difference -- it was an argument that RFC was raised -- that was raised and RFC didn't respond to, or did respond to but didn't respond specifically to.

The MBIA objection is different in kind. It was an objection raised, an argument raised against the --

THE COURT: But it was not offered for the truth of the matter asserted.

MR. JOHNSON: It was argued for the effect on -- it was information available to RFC that there was objection -- there was this objection to the settlement.

THE COURT: Mr. Scheck.

MR. SCHECK: I'm sorry. I guess I would respond with a question of how is it that Mr. Lipps' declaration was not information available to RFC? Is there some rule that it's information available to RFC, but only if it's

proffered by certain parties? It can't be defendants only, because we know that MBIA is a plaintiff. So there's just no distinction here. It's an unprincipled distinction.

THE COURT: All right. These are arguments and I'm going to let them proceed and the Court will view the basis of the argument on both sides; and if the Court has some concern about the use of these documents, the Court will act accordingly.

You may proceed, Mr. Nesser.

MR. NESSER: Thank you, Your Honor.

So we talked about Mr. Hawthorne. We talked about Mr. Hawthorne's testimony about assigning probabilities in this context, which has not been meaningful or realistic.

And Mr. Lipps, as well, in the bankruptcy said that, quote -- well, I'll read it. "That in a developing area of law, such as this one, an attorney cannot reliably or meaningfully assign probabilities to the potential outcomes." He said there were numerous unresolved issues of law. He said it was a fledgling area. And then he said that, "In order to conduct litigation risk analysis on an RMBS case, given all of that, an attorney would have to assign highly speculative percentages to the resolution of all of these issues." And that he then said, "The end result is little better than guesswork and therefore provides no meaningful guidance."

And I think that was pretty powerful to begin with, but I think it also required additional resonance in light of what the Court heard from Dr. McCrary today. Dr. McCrary, I asked him the question. If it were the case -- if it were the case that as a factual matter it's not possible to assign probabilities in any meaningful way, right, probabilities that apply meaningful guidance, what would you have done? And he says, "Well, I guess I would have done the same thing that Dr. Snow did. I would have probably approached the problem the way that Dr. Snow did. That is to say, if there's genuinely no ability to have any assessment of the relative strengths of claims and defenses, then I think it's right that you can't actually take that into account."

Your Honor, that is Dr. McCrary; and Mr. Johnson stood up and said, Well, we can look at some of them or maybe we could get probabilities, but there's just literally no evidence of that. That's just argument.

So one other piece of evidence, by the way, that this is not a reasonable way to allocate the settlement is Wave One. Right? We had dozens of defendants. Not one of them argued that there was an allocation problem because of a strength of claim issue. And why is that? Well, part of the reason, I suspect, it's consistent with the evidence that's been introduced, is that when you're dealing with all

of these strengths of claims issues and you're making probability assessments one by one by one on issues that each one of them is going to impact a different originator differently depending on their concentration of loans, it's just not feasible to do that in a principled way that's going to make everybody happy.

And so I understand PRMI coming here and saying, Well, I found these four factors that happen to favor me on a strength of claim basis, right? And I suppose that's understandable that they would want to do that. But you can't just isolate the things that help you and ignore everything else that doesn't help you.

And I want to talk a little bit about why it is that it would not have been possible to take everything into account. So, Your Honor, conservatively I was trying to kind of count up how many strength of claim issues have been introduced in evidence and I counted 17. I counted 17.

So we have the fraud disclaimer, the fraud rep, the credit grade rep, the loan program rep, the substantial compliance rep, the MLS rep, the no-default rep -- and recall we have two flavors of the no-default rep, so we're now up to nine -- causation, that's ten. I'm now out of fingers. Materiality is 11. Election of remedies, other breach-level disputes, and we have a cluster of statute of limitations issues. Statute of limitations with no tolling

agreement. Statute of limitations with a tolling agreement with investors, statute of limitations with a tolling agreement with a trustee, equitable tolling.

And so there are 17 of these issues. There were others that were the subject of testimony. For example, Dr. McCrary in his report said that there was a differential strength of claim issue relating to whether specific claims had been included in the monoline proof of claim, right? So that, I suppose, is another one. And so this is just a selection of part of what we're talking about.

And so not only that, not only are there 17, but they interact with one another. Mr. Hawthorne testified, right, that there are some of them that if you win one, the likelihood of success on the other increases and vice versa.

And we had a hypothetical that we did with Mr. Hawthorne and with Dr. Snow that I think kind of illustrated some of what we're dealing with here. And so the hypothetical, the Court may recall, involved the borrower who said he made $100,000 a year and, in fact, it was $80,000 a year, in a transaction with a fraud disclaimer and in a transaction with one of the three flavors of no-default rep.

And so if you wanted to conduct this strength of claim analysis on that loan, well, first question I suppose is would RFC have asserted the fraud disclaimer? Because we

heard testimony from Ms. Farley and from others that it would have been pretty difficult for RFC to stand up in court and say I'm not liable because I was involved with a security that is replete with fraud. So that's a percentage, right? Maybe they will assert it. Maybe they won't.

Then let's say they assert the fraud disclaimer. Next question. Can you actually prove fraud, right? Can you prove fraud? And so that's a probability too because, as we heard from multiple witnesses, fraud is difficult to prove.

Let's say you don't prove fraud or let's say you decide not to prove fraud. Well, then the question you have is this is a misrepresentation. Does a representation give rise to liability under a no-default representation, and under the specific no-default representation that we are talking about here? Well, that's a probability too, right?

Now, Your Honor, I don't know how many probabilities you have to add to this chart. There are a lot of them. You then have to ask the question, How do they relate to one other? So presumably if RFC -- the extent to which RFC would assert a fraud disclaimer would depend upon whether it was likely that RFC actually could prove fraud. That's just one example. But there are other ways in which these could intersect, and Mr. Hawthorne talked about that

fact.

And so this, just very quickly, becomes completely unworkable. And, Your Honor, this is just an example involving one loan and a few of the 17-some-odd issues that would have had to have been taken into account.

So now, Your Honor, ask the question, what would happen if we expanded this to 17 issues across hundreds of thousands of loans? It's just not a feasible way to proceed and it's probably why it's not the way that the parties in the real world actually did proceed.

And I will say one other thing, which is we've heard lots of criticism from Dr. McCrary about all of the uncertainties and margins of error issues in Dr. Snow's damages methodology. Your Honor, imagine if we had included all of these probabilities and intersecting probabilities on top of that. I shudder to think how many pillars of statistics we would have been accused of violating in that circumstance.

So, Your Honor, that brings me close to the end. Just a couple of things to talk about on the calculation.

So Dr. Snow has estimated and has calculated a allocation of $5.4 million. I should pause and say that's a lot of money relative -- that's not a lot of money relative to what's been required to litigate this. But putting that to one side, the calculation is $5.1 million for the trust

settlement, $400,000 for the monoline settlement.

And I'll be kind of brief here. Dr. McCrary in his testimony talked a lot about how in his view Dr. Snow's assignment changed over the course of these cases and that that had all kinds of negative implications for Dr. Snow's results. I would suggest, Your Honor, that the only expert in this case whose assignment changed over the course of these cases in a way that negatively impacted his opinions is Dr. McCrary.

And what I mean by that is Dr. McCrary was, of course, HLC's expert at trial and he testified in that trial that, number one, trust allocation is basically okay. He said that again today.

Number two, he testified, well, the monoline allocation is problematic.

And number three, his testimony on strength of claim was a null set. He said nothing at all about strength of claim.

And so what happens now that you have PRMI and Dr. McCrary now has to find something to nitpick about and, well, he can't talk much about the trust rep allocation because he's already said that it's basically fine. He can't say anything really consequential on the monoline allocation because, number one, it's in the scheme of things not a relatively large amount of money and we now have a

non-extrapolated number that he doesn't dispute that's within a hundred some thousand dollars of his actual sampled monoline allocation, right? So he doesn't have anything consequential to say on the monoline side.

So what does he do? Well, what he does is invent a whole new pillar of statistics and say we violated it because we didn't take into account strength of claim, which he now claims is a fundamental error, a fundamental violation of statistics that he happened never to have raised in years of litigation in Wave One. I think, Your Honor, to recite that chronology is to demonstrate why it has no merit.

Your Honor, I think to conclude, the Trust in this case, I think we've tried to and I think we have been reasonable. We're seeking only PRMI's fair share of the liability that it caused based on an assessment of what real people in the real world did and would do. And we would ask the Court to reject PRMI's unrealistic hyper technical readings and reject its suggestion that its fair share of the liability is zero. So we would accordingly request that the Court order $5.4 million plus interest and fees.

Before I sit down, I did just want to thank Your Honor and chambers for all of the time and attention and extraordinary work certainly over the last few days, which is really deeply appreciated by everybody.

Thank you.

THE COURT: Thank you, Mr. Nesser.

All right. Mr. Nicholson.

MR. NICHOLSON: Ten seconds. At the beginning of his argument Mr. Nesser said out of an abundance of caution he was renewing his summary judgment motions for preserving purposes of appeal. You know, I don't know if it's necessary, but I just wanted to note for the record we renew our oppositions to those motions as well as our cross motions for summary judgment. I just wanted that to be clear since he raised it.

THE COURT: All right. And for the sake of the record, I suppose the Court ought to say that the rulings stand.

All right. Well, thank you very much. You know, it's really a pleasure to try a case with such talented counsel. And when I think back of what we've survived, we have gone through marriages and children and grandchildren and Bar Mitzvahs. We've gone through a government shutdown. We've gone through sequestration and now a pandemic. So it's been quite a ride. So I think it's fair to say that the Court and chambers appreciates all the cooperation we've gotten from counsel and the parties and their staff.

The Court will look forward to receiving the proposed findings and proposed conclusions of law and will

of course work diligently to get them out as soon as we can.

Ms. Nelson.

MS. NELSON: One question that just occurred to me, Your Honor, is whether Your Honor would like to have a full set of binders with the admitted exhibits at some point.

THE COURT: Well, given the number of deal documents and the like, I don't know. Why don't you let us see. I think maybe the better thing to do is if we need something, we'll reach out.

MS. NELSON: Okay.

THE COURT: I think that's the better way to approach it.

MS. NELSON: We could also provide it electronically if it would be helpful to have --

THE COURT: If you provided it electronically, I think that would be a really good idea.

MS. NELSON: Okay. Thank you, Your Honor.

THE COURT: All right. Very good. Anything further?

MR. JOHNSON: Your Honor, assuming -- I won't assume that there's agreement, but if there is agreement, should we just -- we have copies of the slides that you asked for. Should we hand those up now?

THE COURT: Yes, I think that would be helpful.

MR. JOHNSON: Okay.

THE COURT: All right. Very good.

Court is adjourned.

(Court adjourned at 3:48 p.m.)

* * *

We, Lori A. Simpson and Carla R. Bebault, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Lori A. Simpson*
Lori A. Simpson, RMR, CRR

Certified by: *s/ Carla R. Bebault*
Carla R. Bebault, RMR, CRR